

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

JANUARY TERM, 1919.

No. 3247. **556**

No. 14, SPECIAL CALENDAR.

FRANK LEITCH, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 30, 1919.

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Court of Appeals of the District of Columbia.

FRANK LEITCH, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA.

1 In the Police Court of the District of Columbia, December Term, 1918.

No. 223,464.

UNITED STATES

vs.

FRANK P. LEECH.

Information for Vio. Act May 18, 1917.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

Information Filed December 6th, 1918.

2 In the Police Court of the District of Columbia, December Term, A. D. 1918.

DISTRICT OF COLUMBIA, ss:

John E. Laskey, Esquire, Attorney of the United States in and for the District of Columbia, who, for the said United States, prosecutes in this behalf, by Ralph Given, Esquire, one of his assistants, comes here into Court, at the District aforesaid, on the sixth day of December in the year of our Lord one thousand nine hundred and eighteen in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one Thaddeus R. Bean that one Frank P. Leech, late of the District aforesaid, on the fifth day of December in the year of our Lord one thousand nine hundred and eighteen with force and arms, at the District aforesaid, and within the jurisdiction of this Court, did then & there wilfully, unlawfully and knowingly ship, carry and transport certain intoxicating and spirit-ous liquor commonly called whiskey into the District of Columbia, and into a zone five miles wide from the nearest boundary of a certain military

camp of the United States, to wit, Camp Meigs, in the District of Columbia, in which said camp not less than two hundred and fifty officers and enlisted men have been stationed, for more than thirty consecutive days, the said District of Columbia then and there being a city, town and District, within which the sale of alcoholic liquors is prohibited by local law against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Frank O. Leech in this behalf to make h- answer to the said United States touching and concerning the premises aforesaid.

JOHN E. LASKEY,
Attorney of the United States
in and for the District of Columbia,
 By RALPH GIVEN,
His said Assistant.

Personally appeared Thaddeus R. Bean before me this sixth day of December A. D. 1918 and being duly sworn according to law doth declare and say that the facts as set forth in the foregoing information are true.

RALPH GIVEN,
Assistant Attorney of the United States
in and for the District of Columbia.

[Endorsed:] 500 on bond O. C. S. No. 223,464. United States vs. Frank P. Leech. Vio. Act of May 18, 1917. Witnesses: ———. 12/7/18. Demurrer filed against. 12/9/18, Motion for B. of P. filed & overruled. Def't arraigned. Judg. Guilty.

3 December 7th, 1918.—Demurrer filed and argued.

4 In the Police Court of the District of Columbia, Holding a United States Branch.

U. S., No. 223,464.

UNITED STATES

vs.

FRANK P. LEACH, Defendant.

Demurrer.

Now comes the defendant by his attorney, James A. O'Shea, and says that the information filed herein against him is bad in substance.

JAMES A. O'SHEA,
Attorney for Defendant.

NOTE.—Among the matters of law to be argued is that the information fails to state in law a crime.

JAMES A. O'SHEA,
Attorney for Defendant.

5 December 9th, 1918.—Demurrer overruled. Motion for Bill of Particulars filed, and overruled. Defendant arraigned.

6 In the Police Court of the District of Columbia, Holding a United States Branch.

U. S., No. 223,464.

UNITED STATES

VS.

FRANK P. LEACH, Defendant.

Now comes the defendant by his attorney, James A. O'Shea, and moves the Court to require the District Attorney to furnish him with a Bill of Particulars in the above entitled cause for the reason that the information filed herein is not specific enough to advise him first as to the amount of whiskey he is alleged to have brought in in violation of law. Secondly, The information fails to advise in what respect he has violated the law so that he may know what charge he shall be called upon to meet at the Trial Table.

JAMES A. O'SHEA,
Attorney for Defendant.

7 December 9th, 1918.—“Plea not Guilty” entered. Demand for Jury Trial waived.

8 January 4th, 1919.—Judgment Guilty.
Defendant Sentenced to pay a fine of \$50.00, and in default to be committed to Jail for Thirty Days.

9 January 4th, 1919.—Motion in Arrest of Judgment filed, argued, and overruled.

10 In the Police Court of the District of Columbia, Holding a United States Branch.

U. S., No. 223,464.

UNITED STATES

VS.

FRANK P. LEACH, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant by his attorney, James A. O'Shea, and moves to arrest the judgment on the verdict in the above entitled cause for the following among other reasons.

1. Because the information does not allege that there was any offense committed.

2. Because the said information is defective and insufficient, in that the alleged offense was not set out with sufficient certainty, completeness, precision and definiteness, and said information is too vague, indefinite, incomplete and uncertain to charge in law a crime.

3. Because said information is fatally defective in other particulars.

4. Because the information was not sufficient to put the defendant on inquiry as to what he was expected to answer at the Trial Table.

5. The provisos are not set forth.

6. This is an attempt by this information to delegate power to regulate commerce to the President of the United States and the Secretary of War, and hence is unconstitutional.

11 7. The regulation upon which this information is founded is in contravention of the Interstate Commerce Clause of the Constitution of the United States.

8. It is in violation of the Fifth Amendment to the Constitution of the United States.

9. It is in violation of the Fourteenth Amendment to the Constitution of the United States.

10. It is an attempt to regulate the commerce between the States.

11. The regulation is inoperative.

12. It is a delegation of legislative power to the President of the United States and the Secretary of War, and this is unconstitutional in that it prevents shipments to citizens between states.

13. The information does not allege as Commander in Chief of the Army the President of the United States made this regulation.

14. By the construction placed upon this regulation it supersedes and repeals the Shepherd Act, to prevent the manufacture and sale of alcoholic liquors in the District of Columbia, and for other purposes, approved March 3, 1919, Public No. 383, 64th Congress.

15. The law is unconstitutional in that it forbids one person to have liquor in his possession.

16. The regulation is unreasonable in that in attempting to prohibit it is an interference with private rights.

17. The regulation attempts to prevent the bringing of liquor into the District of Columbia from another state which it has no power to do.

12 18. Mere possession even in large quantities is not an offense under the law.

20. It is an interference with the personal rights of the defendant.

21. The regulation does not authorize the rejection of the application of the Shepherd Act, which permits citizens of the District of Columbia to have liquor for their own use without putting the burden upon them.

22. There is a local law applicable to the District of Columbia known as the Shepherd Act which is in full force and effect and the Presidential regulation does not supersede this Shepherd Law.

And for other reasons on the face of the record.

JAMES A. O'SHEA,
Attorney for Defendant.

13 January 4th., 1919.—Bill of Exceptions presented, signed, sealed, settled, and filed.

14 In the Police Court of the District of Columbia.

U. S., No. 223464.

UNITED STATES

vs.

FRANK P. LEECH.

Bill of Exceptions.

15 Be it remembered that at the trial of this cause which came on for hearing on Saturday, December 7, 1918 and before a plea was entered the defendant by his counsel filed a Demurrer to the Information herein on the ground that no offense was charged.

That on December 9, 1918, Monday, after argument said Demurrer was overruled and then and there the following occurred.

The Court (Judge Hardison): Gentlemen, I am ready to decide this question raised by the demurrer in the case of United States vs. Frank Leitch.

I have given this matter considerable attention. It presents an interesting question from a legal standpoint, and a far more interesting one from a practical standpoint.

The President, pursuant to the authorization by Act of Congress, approved May 18, 1917, made this order relative to the prohibition of intoxicating liquors around military establishments and camps. Section 12 of that Act, in its pertinent part, reads:

"That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps," and so forth.

Now, the language there is "the prohibition of alcoholic liquors in or near military camps." It does not read "governing the use" or "governing the sale" or "governing the importation" or "governing the gift", but it is "governing the prohibition of alcoholic liquors", and under that language the President, I think would not have had power to have made a regulation governing the sale or gift alone or governing the importation alone; but it was governing the prohibition of alcoholic liquor. Congress made the power of the

President as far-reaching and all-embracing as it was possible for language to make it. It was the intent of Congress that if the President should exercise that power it should be exercised for the purpose of obliterating intoxicating liquor around these establishments; and, when the President acted the inference is that he acted with that end in view. His objective was not to regulate the use of it or the importation of it; but to prohibit it around these establishments.

The Act made certain exceptions which it is not necessary now to mention, and when the President drafted the order he made two provisos saving the right to have and use liquors for two purposes only. The order in its relevant parts reads:

"Around every military camp at which officers and enlisted men not less than two hundred and fifty in number have been or shall be stationed for more than thirty consecutive days, there shall be, for the purposes set forth in this regulation, a zone five miles wide, except that within the existing limits of an incorporated city or town, within which the sale of alcoholic liquor shall not be prohibited by the state or local law, the zone shall not include any territory more than one-half mile from the nearest boundary of such camp. Alcoholic liquor, including beer, ale and wine, either alone, or with any other article, shall not directly or indirectly be sold, bartered, given, served or knowingly delivered by one person to another within any such zone.

Provided also "that this regulation shall not apply to the sale or gift of such liquor by registered pharmacists to licensed physicians or medical officers of the United States for medicinal purposes, or to the sending, shipping, transmitting, carrying or transporting of such liquor."

In making the regulation the President was attempting not simply to regulate the sale or the importation of it, but was doing what Congress intended he should do where the emergency should exist, that it prohibit it absolutely around these places; and he made only two provisos or exceptions; one was, with reference to the "giving or serving of such liquor in a private home to members of the family or bona fide guests, other than members of the military forces, or the sending, shipping, transmitting, carrying, or transporting of such liquor to a private home for use as aforesaid", and the other with reference to the delivery to and use by registered pharmacists, licensed physicians, or medical officers of the United States for use for medicinal purposes.

That is, it might be used in the home or it might be used for medical purposes. Those are the only two exceptions.

Now, the question comes up, in the light of the legislative history of this Act: is it necessary to negative in this information these exceptions?

There are many cases on that subject. The question has frequently come up under somewhat similar statutes, and authorities may be found on both sides; of the question. But there are two cases that I think deserve notice. One is this case of Lehman versus the District of Columbia. That was a prosecution in the Police

Court for an alleged violation of a provision of the excise law in the District of Columbia, and Section 6, under which that prosecution was had, reads thus:

"That under the license issued in accordance with this Act, no intoxicating liquors shall be sold, given, or in any way disposed of to any person who is in the habit of becoming intoxicated if such person's wife, mother, or daughter shall in writing request that the saloon keeper shall not sell to such person above age of sixteen years, or between twelve o'clock midnight and four o'clock in the morning, during which last-named hours and on Sundays every bar room and other place where intoxicating liquors are sold shall be kept closed and no intoxicating liquor sold."

This is the proviso that was relied on there:

18 "That the keeper of any hotel or tavern having a license under this Act may sell intoxicating liquors to bona fide registered guests in his hotel or tavern at the meals or in the rooms of such guests."

There the information did not negative that the person to whom the sale was alleged to have been made was being served at a meal or that liquor was served in his room. The contention was made there that that was material to the offense and should be averred in the information.

The Court of Appeals, in a very well reasoned and fully considered opinion, decided that that was not necessary. The syllabus of that opinion reads thus:

"It is not necessary that an information in the Police Court, charging the defendant with selling intoxicating liquors on Sunday and failing to keep his bar room closed on that day, in violation of the Act of Congress of March 3, 1893, should allege that the defendant did not come within the scope of the proviso of that Act allowing hotel keepers to sell liquors to bona fide registered guests on Sundays."

Now, that case, it seems to me, is practically on all-fours with this case. I am unable to differentiate the two. It seems to me they are practically identical. But if there is any difference, I think this case at bar is a stronger case than the Lehman case, on account of this being strong language used in the Act of Congress which gave the President the power to prohibit alcoholic liquors around these establishments. It shows that the object was prohibition, to absolutely obliterate intoxicating liquor around these establishments. Now, the rule in reference to negating provisos is laid down in an old case, the case of United States versus Cook, which is a landmark on this question, the syllabus to that case reads thus:

19 "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the statute defining the offense is so entirely separable from the excep-

tion that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

It appearing here that the object was prohibition and that it is an offense to have liquor or use it other than as set out in the exceptions I think every ingredient of the offense is laid when you allege that liquor was brought into the District. The provisos are in an unusual degree exceptions out of the mass of matters that are prohibited, and I think that they clearly are matter of defense than can be taken advantage of by the pleader. I do not think it is necessary to negative them and therefore the judgment of the Court is that the demurrer be overruled.

Mr. O'Shea: I desire to take an exception to that, and to get this matter clearly before Your Honor, I, at this time, file a Motion for a bill of Particulars. Your Honor allows me an exception to the overruling of the demurrer?

The Court: Yes.

Mr. Given: I think Your Honor can pass on that motion for a bill of particulars right now. The amount of liquor is immaterial. It does not specify any amount.

Mr. O'Shea: That is just the point. You have arbitrarily adopted a standard here of six quarts to a person.

Mr. Given: That is not a fact — all. You read something in the newspapers, and believe everything you read.

Mr. O'Shea: Is it not a fact that you have refused to proceed against people who have brought less than six quarts in?

Mr. Given: It is not.

The Court: This information reads:

"It then and there wilfully and knowingly shipped," and so forth.

(The Court read from the information.)

I think that is charging him only with one offense.

Mr. O'Shea: It simply says "whiskey" if the court please.

The Court: "A certain intoxicating and spirituous liquor."

Mr. O'Shea: If he came in with a drink on him he would be transporting it.

The Court: I think that is as specific as that can be made. I do not see how you can make that any clearer.

And, as to the other point, as to the amount of liquor, I suppose to be consistent with my ruling on the demurrer, I would have to overrule that, too, because the amount is not material. It would be merely a matter of defense and, as I have said, I do not think the amount is necessary to be averred, although it may be important in the matter of the defense. It would not be material at all until the defendant made a certain defense. So the amount is not an essential ingredient unless a man relies upon it as a defense. He might plead not guilty and the defense might be that he did not bring it in, and

of course, the amount then would not be material. I can conceive of several defenses he might make where the amount might not be material at all, but if he brought it in for his own use, then the amount might be an important question. The motion for the bill of particulars is overruled.

The motion as filed by Mr. O'Shea for the Bill of Particulars is as follows:—

21 In the Police Court of the District of Columbia, Holding a United States Branch.

U. S., No. —.

UNITED STATES

VS.

FRANK LEACH, Defendant.

“Now comes the defendant by his attorney, James A. O'Shea, and moves the Court to require the District Attorney to furnish him with a Bill of Particulars in the above entitled cause for the reason that the information filed herein is not specific enough to advise him First as to the amount of whiskey he is alleged to have brought in in violation of law. Secondly: The information fails to advise in what respect he has violated the law so that he may know what charge he shall be called upon to meet at the Trial Table.

JAMES A. O'SHEA,
Attorney for Defendant.”

22 Which motion for a Bill of Particulars was overruled and to the overruling of this motion for a Bill of Particulars defendant by his counsel noted an exception and declared his intention to apply to the Court of Appeals for a Writ of Error.

That on December 9, 1918 before the Honorable Robert Hardeon, one of the Justices of the Police Court without a jury, jury trial being waived, the United States Attorney to maintain the issues on its part joined called one THADDEUS R. BEAN, who testified substantially as follows: That he was a Sergeant of the Metropolitan Police Force of the District of Columbia; that a train which he designated as the “Bootleg Special”, stopped in the yards of the Washington, Baltimore & Annapolis Railroad Company at 15th and H Sts., N. E., that the terminal of the regular trains is at 15th and New York Ave., N. W., that witness has seen people getting off the “Special” at 15th and H Sts.; that they had packages which looked to be liquor; that he has seen the “Bootleg Special” arrive three times and stop at 15th and H Sts., N. E.; that he does not know how many coaches were on it but Thursday night it had five coaches.

That thereupon the Court asked what class of people were on these trains and this witness was permitted to state, over the objec-

tion and exception having been noted on behalf of the defendant, that they were pretty much all colored people that came off of it.

That thereupon the following occurred:

By the Court:

23 Q. What class of colored people?

A. A poor class of people, as they looked.

Mr. O'Shea: I object, if the Court please, and move to strike that out.

The Court: Overruled.

Mr. O'Shea: May I have an exception?

The Court: Yes; an exception may be noted.

By the Court:

Q. Can you draw any distinction in reference to appearance between this train and trains that ordinarily run on that line?

Mr. O'Shea: I want to object to that, if the Court please, and ask an exception. That is calling for an opinion.

The Witness: Shall I answer it?

The Court: Yes.

I have been on those trains from Baltimore to Washington on several occasions and I never saw any crowds like this on those other trains.

That the evening this gentleman got off the train he had this suitcase which contained eight quarts of whiskey, two bottles of gin, one bottle of brandy, two bottles of wine, and a bottle of rum; and that was broke.

That thereupon it was agreed between counsel for the Defendant and the United States that the White House station was within five miles of the Camp Meigs and that Camp Meigs is such a camp as would come within the Presidential Proclamation, and it was further agreed that the District of Columbia is a District within which the sale of liquor is prohibited, and it is further agreed that the regulation in this case was a Presidential Proclamation.

24 Cross-examination:

By Mr. O'Shea: Witness has seen this train three times but does not know the dates sometime in the last month and a half. That the basis of witness's statement that this was the "Booze Special" was through some people standing around who stated "here comes the Booze Special"; that at 15th and H Streets they unload a lot of freight; that there is no freight unloaded at 15th and New York Ave., N. W. that witness knows of; that witness has no knowledge that the Railroad Company would not permit people to go to 15th and New York Ave., N. W. with packages; that witness has no personal knowledge of the fact that if passengers had packages they

would not be permitted to take them to 15th and New York Ave., N. W.; that there was a quart of brandy included in what the defendant had; that there were two bottles of wine, one of Sherry and one of Port; that there was a bottle of rum as defendant stepped off the train, the handle broke off the suit case, and the bottle of rum broke. That witness did not ask defendant whether this liquor was for his family but that the defendant stated afterwards after the arrest that he had gotten this for his own personal use; that he stated this while they were standing there waiting for the wagon to take them away. That witness did not notice whether there was an affidavit appended to the package; that witness has never seen an affidavit such as is required under the Shepherd Law. That witness did not find any affidavit.

The Government to further maintain the issues on its part joined called one JOSEPH DELLAMICO, who testified substantially as follows: that he is detailed as Precinct Detective in No. 9. That he knows where the Washington, Baltimore & Annapolis Terminal is situated at 15th and H Streets, N. W.; that then and thereupon over the objection of the defendant and a Motion to strike out the testimony of the witness, the witness was permitted to state that it
25 had been part of his duty to meet as many of these trains as possible known as the "Bottleg Special"; that witness ascertained that there are four trains run each day as far as the White House Station. That one was to arrive at 11:30, another at 1:30; another at 3:30 and another at 4:30. That sometime they would run pretty regular; other times they would be fifteen or twenty minutes late that he met as many as four sometimes; some days one and some days two from along about the 15th of November until the 30th of November while there were races at Bowie the trains were cut down to one; that one would arrive in the city anywhere from 7:30 to as late as 10:30 that there were attached to these at least four or five cars each of them loaded with men and women, both white and black carrying suit cases and bundles. That then and thereupon over the objection of counsel for the defendant and an exception having been reserved on his part witness was permitted to answer that these trains differed from the regular trains in that regular trains went all the way through; that the regular trains usually contained two cars whereas these other trains contained sometimes four and sometimes five cars. That just outside of the station there was a switch and just about the time the train hit this switch, they would begin jumping off with their suit cases and packages, and always a lot of express wagons and automobiles would be around there, waiting to haul them. That witness has seen as many as a dozen wagons banked up on 16th street, just south of Bennings Road, and some on Bennings Road and just about the time the train would hit the switch and the people would begin jumping off, they would pull out in the Bennings Road and solicit the passengers that jumped off the train with their packages; that then and thereupon over the objection of the defendant and exception having been reserved on the part of the defendant *and exception having been reserved on the part*

26 *of the defendant* the question was asked as to whether or not there was any difference in the character of passengers carried on these trains and the character of passengers on the other regular trains. That witness stated that the passengers on these trains were composed almost entirely of colored men and women; that witness does not believe altogether a dozen white women alight from these trains.

That then and thereupon over the objection and exception having been reserved on the part of the defendant, the witness was permitted to state that in respect to the question "What class of colored people were they?" that quite a number of them have been around this court for bootlegging and one or two of them I have arrested; that some of them were convicted that then and thereupon the witness was permitted to state over the objection and exception having been reserved on the part of the defendant that he does not know how these trains were christened, but they were commonly known among the police and the railroad men as the "Bootleg Special".

That then and thereupon counsel renewed his objection and moved to strike out all of the testimony on the ground that this defendant took this train and what may have gone on for six weeks preceding this, and what may have been known to others, should not be put into this case to be used against him. Objection overruled and exception noted.

Cross-examination:

Witness does not know the defendant and could not say that he ever saw him before and can not say that he ever saw him on any of these trains before.

The Government to further maintain the issues on its part joined called one WILLIAM F. BURKE, who testified that he was a member of the Metropolitan Police Force; was with Sergeant Bean last Thursday at the Washington, Baltimore & Annapolis Railroad at 15th and H Sts., N. E.; that the defendant got off this train at 7:15 as he came off the step of this train the Sergeant arrested him and turned him over to me; that the defendant had eight quarts of whiskey; two quarts of wine, two bottles of gin and a pint of rum.

Cross-examination:

That the witness did not ask the defendant what he had the wine and liquor for but the defendant told him he had it for his own use and said that he had not done anything; that the witness did not ask him anything.

That then and thereupon the Government rested.

That then and thereupon the defendant by his counsel moved to dismiss the case against this defendant on the evidence as adduced by the Government without any proof being introduced by the defendant, because of the fact that the defendant was arrested and gave

this explanation, and it was a reasonable explanation, and because he did not have any quantity of whiskey there or any quantity of vinous liquors that would shock any court or the conscience of any court; he having eight quarts of whiskey, two quarts of gin, one quart of brandy, two bottles of wine (one of Port and one of Sherry), and one bottle of rum.

That then and thereupon the following occurred:—

The Court: "According to the view I expressed this morning, the quantity a man brings in is immaterial except as it bears
28 upon the purpose *dor* which he brings it in. If a man brought a half pint in for an unlawful purpose it would be as much as violation of the law as if he brought a thousand gallons in.

Mr. O'Shea: What is there to show that he brought it in for an unlawful purpose? If there any proof whatever that he brought it in for an unlawful purpose?

The Court: No; except the fact that *hw* brought it in puts the burden upon him to exonerate himself. If a man with the experience of this man, with the appearance of decency and respectability that this man has, brought in, say a quart, I would say that on the face of the thing the Government had not made out a case; but when you prove that he has brought in twelve or fifteen quarts of intoxicating liquors, without saying how strong that case is against him, he stands in such a light that he must then exculpate himself.

Mr. O'Shea: In other words, he is presumed to be guilty?

The Court: No; he is not presumed to be guilty, but the thing that is guilt is the having of it here. That is guilt of itself, unless he can exonerate himself.

Mr. O'Shea: To Your Honor's refusal to dismiss this defendant on the testimony offered by the Government, I desire to take an exception, upon the ground that they have not shown, as they alleged in their information that this liquor was brought in here unlawfully. I would like to call your Honor's attention to the information.

(Mr. O'Shea read the information referred to.)

They have not proved that it was done unlawfully. They have averred a conclusion and have not proven it.

The Court: Suppose a man is indicted for murder and the circumstances are such that the facts point to the guilt of the defendant——

Mr. O'Shea: They will have to prove it, or else the Court will dismiss him.

29 The Court: When you prove that a man fires a revolver that is some proof——

Mr. O'Shea: If the element of self-defense arises they would not put him to the proof, they would dismiss him right at the outset of the Government's case.

Mr. Given: How are they going to arrive at that?

Mr. O'Shea: You should not allege it was done unlawfully unless you expect to prove it.

The Court: Whether it was done unlawfully or not is not a statement of fact, but is simply a conclusion, and, although it appears in the declaration, it is not necessary to prove it.

Mr. O'Shea: Very well. Your Honor will allow me an exception?

The Court: Yes.

Mr. Given: I want to add that the reasons on which the counsel for the defendant based his motion to dismiss were that the statement made in explanation was a thing more than a self-serving declaration.

The Court: Well, if he takes the stand——

Mr. Given: That is it exactly; but it is nothing but a self-serving declaration up to the time he takes the stand.

Mr. O'Shea: In view of the peculiar position I am placed in by Your Honor's ruling, I want Your Honor to bear this in mind. If I put my proof in I do not want it understood that I am waiving any points I have raised.

The Court: You are saving all your rights.

Mr. O'Shea: I mean in this respect: It has been held by the Court of Appeals and some of the Federal authorities that if, after making these various motions, I go into the defense, I may
30 be considered to have waived the motions I have made.

The Court: Is that the rule of the Court of Appeals?

Mr. Givens: Not in a case of this kind.

Mr. O'Shea: The Court of Appeals has said in a criminal case that if the defendant goes on with his defense he waives the motions he has made, along the lines I have suggested. And so I would like, if possible, to keep my reservation such that if I do enter proof it will not be construed against me. Ordinarily I stand on the record as it is, and I would not offer a line of proof, in view of what the Court of Appeals has said about entering proof, but if I may make that reservation, I would like to do it.

The Court: So far as I have power to do that, you can put any proof you wish on that condition. I do not know how the Court of Appeals looks at it. If the Court of Appeals has adopted a rule of that sort they ought to change it.

That thereupon the defendant to maintain the issues on his part joined called one WILLIAM L. WAGNER, who testified substantially as follows: that he is the Traffic Manager of the Terminal Taxicab Company, that he has known the defendant since April 28th of this year that he has been employed by the company as a driver since that time; that the defendant is considered one of the best drivers they have; that he does not know of his ever being locked up; that his general reputation for peace and good order is good.

By the Court (Examination): That those who know him say his conduct is excellent.

Cross-examination by Mr. Given:

31 That he is a driver and that his duties are to meet trains and take passengers to hotels or any other place and from hotels, residences or any other place to the railroad station; that part of his duty would be to take strangers.

That then and thereupon the defendant to further maintain the issues on his part joined called one Mrs. LYDIA LEITCH, who testified substantially as follows: that the defendant is her husband; that she remembers him going to Baltimore the other day; that he went to get whiskey and wine, the wine for jelly, and the brandy and rum was for fruit cake and pies for me, and the whiskey was to have in the house in case of sickness, if we should need it.

Cross-examination:

That he left home between eight and nine that witness did not notice the exact time that he left; that witness did not say anything to the defendant about bringing back eight quarts of whiskey; that she left it to him, but it was his first trip over and he said he thought he would get that quantity before it advanced in price.

In response to the Court, witness stated that she had been married to the defendant twelve years that before her marriage she lived in Fredericksburg, Va.; that she married her husband here in Washington; that she has been living in Washington five years; that until that time they lived in Fredericksburg, Va.; that they have lived together since marriage; that she has never seen him intoxicated in her life; his occupation is that of a mechanic and chauffeur; that he has been working as a chauffeur since they came here; that they have two children and live at 1002 Girard St., that they have a three room flat on the second floor; that they have access to the flat through the hall on the porch, the porch is the second floor; through that hall we have a private hall, the second flat. That one child is between ten and eleven and the other will be eight soon; that she

32 does not know her husband's income exactly; that he works on a percentage; that witness guesses his income is from \$75 to \$100 per month. That they pay \$10 per month for flat and their expenses are between \$65 and \$70 per month; that her husband has no property—no account in bank and depends upon his monthly salary; that then and thereupon the following occurred:

By the Court:

Q. How could he afford to buy a supply of liquor as large as this?

A. Well, I suppose he managed to save up a little bit out of his salary, I have it saved up.

Q. How much did you have saved up?

A. Well, he carried fifty dollars over; that was what I had in the house out of his last pay.

Q. Why did you let the whole \$50 go for whiskey?

She did not let the whole \$50 go for whiskey; he was going to get some and she did not know exactly what he was going to get and she told him to get the wine and the rum and the brandy for me to use in the house and the whiskey to keep; that they had not had any whiskey in the house for a long time but that she aimed to have a little in the house; that her husband said it was going to advance in price; that her husband did not drink; that witness did not habitually drink whiskey; that then and thereupon the following occurred:

By the Court:

Q. Why did you want eight quarts?

A. To keep. It was his first trip over there, and he just thought, I suppose, that while he had an opportunity to get it, it would be well to buy it and have it on hand in the case of emergency; that is all I know. I did not know the exact amount he was going to bring, of course.

That then and thereupon the defense to further maintain the issue on its part joined called one FRANK LEITCH, Jr., who testified
33 substantially as follows: that he had never been to Baltimore on any other train; it was his first trip; that he had never brought in any liquor before from Baltimore. That the whiskey he paid \$2.10 a quart for, the gin \$1.75 or \$1.85—for the brandy \$1.45 and for the sherry and port sixty cents that the whole bill amounted to \$23.95. That the purpose of the witness in getting the whiskey was mostly "to keep" that he heard that at any time it might advance in price; that they were going to stop making it; and the wine I got for Christmas purposes, for my wife's jelly and cake; That the Sherry and Port were not quarts but fifths of quarts that then and thereupon the apple brandy was exhibited to the witness and was known as Old Kentucky Brandy. That the Sherry was known as California Sherry AAA and the Port Wine and Peach Cordial; with respect to the Peach Cordial witness was advised that it was brandy; witness stated that he did not know much about this. That one bottle of gin was broken.

That then and there the witness stated as follows:—

Q. When you alighted from the train—I believe you said you had never been on that train before?

A. I didn't know what train to get on. I went to the station, and they would not let me ride on the train. They asked me what I had and I told them whiskey, and they said that I would have to walk four or five blocks and turn one block and get on a train there, and I saw a number of people and I asked them when the train left, and they said the train left at twelve o'clock, but no train left at twelve o'clock. I told my wife I would try to get back at twelve o'clock to go to work. I told Mr. Collins that I would get back that afternoon. He asked me why I wanted to get off and I told him to go to Baltimore to get some whiskey, and some rum and other things for
34 Christmas, that I heard the prices were going to advance; and he said all right, they would hold my car for me. When I did catch that tra- it was quite a surprise to me. When I got off they said I was under arrest, and I asked them what for, and they said "Never mind; you line up." So I got on the outside there and they said that they were arresting them for bootlegging or something like that, and I asked them what it meant and they tried to tell me, and I said that I had gotten this stuff for my personal use. I didn't know anything about there being such a train. They would

not let me get on any other train in the station, and I asked them why, and they said that you were not allowed to carry whiskey.

That then and thereupon in respect to the question asked by the Court witness stated that he was raised in Fredericksburg; had been in Washington for about five years; that his occupation was automobile mechanic, mostly driver, that witness stated that he had Sherry and Port wine and that he had several different kinds of liquor altogether.

By the Court: Why did you get such a vast and varied assortment?

Why for Christmas. They use brandy and rum for cakes and jellies. I suppose that is what they use them for I am no cook.

Do you drink liquor regularly?

No sir.

When did you have any in your house before this?

Well, I *have* a little when the town went dry.

What did you have then?

I think it was probably maybe two quarts of whiskey or something like that, and a little wine, but since then I have not had any, because I never get off, as my boss can tell you. I work quite regularly. I never lose any time because I can not afford to lose it.

35 By the Court:

Q. Why did you want such a variety?

A. Because, as I have said, for the simple reason——

Q. Do you drink all those things?

A. No sir.

Q. Does your wife drink all those things?

A. No sir, I don't know that my wife ever drinks any of those things. I take a drink when I am feeling bad, when I have it in my house.

Q. Is that all?

A. Yes.

Q. What do you drink?

A. Whiskey; I don't drink anything else.

By Mr. Given: What did you get the gin for?

A. My wife's mother comes up once in a while and that is the only thing that she ever drinks. She suffers sometimes from some kind of a pain, and she likes to have a little gin.

By the Court: What did you get the brandy for?

That is for the cakes and pies, I guess, and the fruit cake.

By Mr. Given: You have some peach cordial here?

The Witness: I think that is a brandy. I don't know what it is. You know as much about that as I do. I told them I wanted a bottle of brandy. Why he put that in there I don't know. If I ordered that I don't remember it.

36 That witness did not know it was a special train and did not know anything until that night when he was told it was a "Boot Leg Special" and he "had it throwed in my face several times" even over at the station that he was boot-legging. That at Balti-

more he learned it was a special train he could ride on and carry liquor, and that they would not let you ride on any other train.

That then and thereupon in respect to the Court's question as to his monthly income witness stated that his monthly percentage would run anywhere from probably a hundred dollars, and I will almost average as much as that in tips off and on. Some days we have good and some days we have bad. That his income was about \$200 per month. That he has no bank account but his wife has, that witness does not know what her account is, but expects it is some three or four hundred dollars. That he does not know what his living expenses are. That he turns all of his money over to his wife and when he wants any he goes to her for it. That witness will have a good percentage day and then perhaps the next day wouldn't be so good. That yesterday his percentage was \$6.82; that witness does not work on a salary but works on a percentage. That then and thereupon the defense announced that it had no further evidence.

That then and thereupon the following was stated by Mr. Given, on behalf of the Government:

"The only thing the Government is going to say is that in this case the Government feels that it has done its duty in bringing these people that are charged with bringing liquor into this prohibited zone into Court and proving that they had the liquor in the prohibited zone. At that point the burden of proof shifts.

37 The Court: Let me tell you my view on that. The shifting of the burden of proof is frequently confused with the principle of reasonable doubt. Regardless of the shifting of the burden of proof, I think it is a question on the whole case whether there is a reasonable doubt of the guilt of the man or not.

That then and thereupon the following occurred during the course of Mr. O'Shea's argument:

Mr. O'Shea (continuing) and because, forsooth, this man happens to have eight quarts of whiskey, therefore he is called a boot-legger.

Mr. Given: We do not call anybody a boot-legger.

Mr. O'Shea: You take his picture, you take his finger prints, and you treat him as — murderer.

Mr. Given: I object to the language of counsel, saying that I did something. I say he should be called down for it and reprimanded for any such insinuations.

Mr. O'Shea: I still contend that that is what the Government has done.

The Court: Mr. Given is an unusually conscientious prosecutor, and he resents things that other lawyers would not resent; and I really do not think there is any occasion to resent the remarks of counsel in this case.

Mr. Given: I think counsel goes too far, and when he says I do such-and-such-a thing, I do resent it.

Mr. O'Shea: When I say "you" I mean the powers that be; I mean the people who are responsible for taking this man's picture and finger prints and treating him as if he were a common felon.

The Court: I will say this. That it is not necessary to go out of your way to throw bricks at anybody because I am not passing upon the course of the Chief of the Police Department at all.

38 Mr. Given: I have nothing further to say in the matter, as I think possibly my objection stopped our friend, or Your Honor stopped him, from throwing the rest of the bricks that I think he had ready to throw.

That then and thereupon the Court delivered the following opinion:

The Court (Judge Hardison): Gentlemen, this case is a very important case in several respects. Of course, like all cases in which a man is charged with crime, it is very important to him whether he may be penalized; and, on the other hand, it is important to the Government that in trying to enforce the law, and it is somewhat important as a precedent for future prosecutions. Therefore I feel the responsibility of this case very fully.

Now, nobody testifies here on behalf of the defendant except the defendant and his wife. My experience is, gentlemen, that when a man is accused of crime, that where his wife can testify for him—in some jurisdictions she can not do it at all—but I think the humane rule is that she should be able to testify—that it practically amounts to the testimony of one person. Women are peculiarly made up. They have bigger faults and bigger virtues than men have. God gave a woman an extra supply of heart, and I do not think he gave her quite as much brains as he gave man, and where a woman's sympathies for somebody she loves are not involved, my experience is you can take her testimony as true. I think that anyone would have a greater difficulty in bribing her than in bribing a man. But where somebody she loves is involved, my experience is they come in and cheerfully perjure themselves in order to exonerate somebody. My experience is that I have known women to cheerfully come in court and perjure themselves, and that is more the virtue, perhaps, looking at it from my standpoint, than it is a fault. At any rate, it is the kind of a fault you can excuse to a certain extent.

39 There is no question about this liquor being brought in here, and this man's wife comes here and testifies for him. She says they live there together; that they have this flat and have two children, and her testimony is that his income is about seventy-five or eighty dollars a month, or a hundred dollars a month. She testified that was his total income; and she said, furthermore, that he was not a habitual drinker of whiskey. He testified he had not had any whiskey in his house since the town went dry. He testifies that he has drunk whiskey and whiskey alone, and that he did not drink these other drinks, and, while the charge in the indictment is that this was whiskey, still, you can consider the other things as bearing upon the use that he was going to put the whiskey to.

Now, a man who was a hard drinker, who drank whiskey regularly, might have eight or ten quarts of whiskey in his house; but a man who had not had any for a year and who was not a habitual drinker, and whose income is only seventy-five dollars a month, and whose expenses are about that much—as his wife testifies—when a

man is situated that way and all at once conceives the design of going out and purchasing eight quarts of whiskey, it is rather an unusual thing, to say the least of it. If he is a habitual user of it, and habitually used it, it might not be unusual, but to do it when he does not habitually drink it, it is a remarkable thing, to say the least; and he left his work and went over to Baltimore on this occasion and got eight quarts of whiskey. Not only that, but he brought back seven kinds of spirituous liquors. There was gin and apple brandy——

Mr. O'Shea: Two kinds of wine and rum and a cordial.

40 The Court: Now, that is quite an assortment of drinks. That is about all you will find in the average saloon, almost, and to a man that does not drink regularly, that is quite an array of drinks. He says he used some of these things for culinary purposes, that his wife used them for cooking and so forth, but the use of many of them is wholly unaccounted for, and he does not explain the use of some of them. He drinks whiskey and his wife uses some of them for cooking. Now, it is a matter of common knowledge that in any big town the people who run automobiles engage somewhat in the liquor traffic. I know I lived in a town in the West once where liquor could not be introduced into the Indian country at all, and the best hotel in town was the biggest saloon in town, and the dispensers of intoxicating drinks were the men that operated the automobiles. And this thing, on the face of it, it not reasonable to me. This man's story is not reasonable. Why would he want all this stuff there, he being a chauffeur? It looks like he had an array of liquor there to suit the tastes of his various customers. Now, many people drink wine and some drink gin and some others drink brandy, and some others drink whiskey; and this array he had there would supply fluid for almost any person. This man was engaged in the automobile business and had an opportunity to carry whiskey around. In other words, this is an explanation that does not explain. It is a thing that would not happen one time in a hundred. If a man had gone over there and got six or eight quarts of whiskey, the case would not be as strong against him as it is. His explanation is not reasonable on the face of it.

I appreciate what you say about the danger of the enforcement of this law, and I admit that I am — doubt as to what I ought to do about this.

41 Mr. O'Shea: You ought to give him the benefit of the doubt.

The Court: Because I am in doubt as to what I ought to do, does not mean I am not going to give him the benefit of the doubt.

Mr. O'Shea: But there is another principle of law, and that is that if on any reasonable hypothesis the defendant is innocent, he should be given the benefit of that hypothesis.

The Court: That is true, if he had brought any other evidence here——

Mr. O'Shea: What other evidence could he bring. He brought all that was available.

The Court: Many a man has been hung because he could not get up a better defense.

Mr. O'Shea: It is not a question of getting it up, it is a question of giving the testimony that he had. Suppose this man were in possession of stolen goods and he gave this explanation. It is the only one that is true; you would not want him to make up a defense?

The Court: No, of course not. If this man had not such a variety of liquor——

Mr. O'Shea: I think that that is a fact that goes to prove his innocence.

The Court: I think the contrary.

Mr. O'Shea: Does it seem probable that this man, who has been with this Taxicab Company since April, does it seem probable that if he were engaged in this business of dispensing liquor to people whom he took in the automobile, that there would not be some knowledge of it brought home in all these many months, from April to December?

42 The Court: Well, that might happen; and, of course, it is possible it would not happen.

Mr. O'Shea: On the other hand, if he had come in here and told you that he was a clerk in a store——

The Court: I do not think the case would be quite as strong against him as it is.

Mr. O'Shea: Unless it was a near beer store. Then that might be the same thing.

The Court: I just feel intuitively, almost, that this man had this liquor for an improper purpose; that is the way I feel about it. The man has a good face, and previously he has had a good record. But on the face of it it does not look reasonable to me. As you say, it is the only explanation he has.

Mr. O'Shea: There is no other evidence he could have produced, Your Honor. That is all the evidence he can produce, except on the question of good character. I could bring other witnesses as to his character.

I believe, if the Court please, that this is a case where, if it was before a jury, the jury would acquit him. Do you not suppose that a jury would give this man the benefit of the doubt? If so then your Honor ought to even more give him the benefit.

The Court: They would give him the benefit of the doubt, but I am not saying that they would acquit him.

Mr. O'Shea: When this man is arrested he says that this liquor is for his personal use. That is the statement he makes to the officer. Now, what evidence is there that he ever went there before or that he ever sold any liquor? Absolutely none. Then, will your Honor not take into consideration his good character?

The Court: I do not think he tells a reasonable story.

43 Mr. O'Shea: Well, I do not know wherein it is unreasonable except the fact of the variety; and I think it reasonable. If — wanted to lie about it, he could have done it, but he did not do it.

The Court: Well, this is the first case of this sort we have tried, and I have got to use great caution and common sense in deciding

it. I am going to find this man guilty and let him pay a small fine. I will let him pay a fine of Fifty Dollars.

Mr. O'Shea: I ask Your Honor to withhold the judgment, because I want to apply to the Court of Appeals for a writ of error.

The Court: Well, I think this is exactly the kind of a case to try out. It is about as good a case as you will get hold of to appeal.

Mr. O'Shea: I take it that Your Honor will withhold the imposition of the judgment so I can get my bill of exceptions in shape.

The Court: How much time do you want?

Mr. O'Shea: I think I can get it in shape within two or three days.

The Court: I will give you any reasonable time you want.

44 The said Motion to Dismiss having been overruled the defendant by his counsel excepted to the rulings of the Court on matters of law, which exceptions were duly noted by the Court on the minutes and thereupon the defendant by his attorney gave notice in open Court of an intention to file a Motion for a New Trial and a Motion in Arrest of Judgment, and in the event of their being overruled, of an intention to apply to the Court of Appeals for Writ of Error.

Then and thereupon the Court sentenced the defendant to pay a fine of Fifty Dollars or in default to serve Thirty days in jail, to which sentence the defendant by his attorney, in view of the motions and in arrest of judgment and for a New Trial to be filed prayed the Court to withhold the formal entry of the judgment until the motions in arrest of judgment and for a new trial were passed upon.

That then and thereupon the defendant was released on a bond in the sum of Five Hundred Dollars, pending the determination of the Motions in Arrest of Judgment and for a New Trial and to abide by the decision of the Court of Appeals.

That then and thereupon a Motion in Arrest of Judgment was filed, which is as follows:

45 In the Police Court of the District of Columbia, Holding a United States Branch.

U. S., No. —.

UNITED STATES

VS.

FRANK LEITCH, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant by his attorney, James A. O'Shea, and moves to arrest the judgment on the verdict in the above entitled cause for the following among other reasons:—

1. Because the information does not allege that there was any offense committed.

2. Because the said information is defective and insufficient, in that the alleged offense was not set out with sufficient certainty, completeness, precision and definiteness, and said information is too vague, indefinite, incomplete and uncertain to charge in law a crime.

3. Because said information is fatally defective in other particulars.

4. Because the information was not sufficient to put the defendant on inquiry as to what he was expected to answer at the Trial Table.

5. The provisos are not set forth.

6. This is an attempt by this information to delegate power to regulate commerce to the President of the United States and the Secretary of War, and hence is unconstitutional.

46 7. The regulation upon which this information is founded is in contravention of the Interstate Commerce Clause of the Constitution of the United States.

8. It is in violation of the Fifth Amendment to the Constitution of the United States.

9. It is in violation of the Fourteenth Amendment to the Constitution of the United States.

10. It is an attempt to regulate the commerce between the States.

11. The regulation is inoperative.

12. It is a delegation of legislative power to the President of the United States and the Secretary of War, and this is unconstitutional in that it prevents shipments to citizens between states.

13. The information does not allege as Commander in Chief of the Army the President of the United States made this regulation.

14. By the construction placed upon this regulation it supersedes and repeals the *Shepherd Act*, to prevent the manufacture and sale of alcoholic liquors in the District of Columbia, and for other purposes, approved March 3, 1917. Public No. 383. 64th Congress.

15. The law is unconstitutional in that it forbids one person to have liquor in his possession.

16. The regulation is unreasonable in that in attempting to prohibit it is an interference with private rights.

17. The regulation attempts to prevent the bringing of liquor into the District of Columbia from another state which it has no power to do.

47 18. Mere possession even in large quantities is not an offense under the law.

19. —.

20. It is an interference with the personal rights of the defendant.

21. The regulation does not authorize the rejection of the application of the *Shepherd Act*, which permits citizens of the District of Columbia to have liquor for their own use without putting the burden upon them.

22. There is a local law applicable to the District of Columbia known as the *Shepherd Act* which is in full force and effect and the Presidential regulation does not supersede this *Shepherd Law*.

And for other reasons on the *the* face of the record.

JAMES A. O'SHEA,
Attorney for Defendant.

48 Whereupon the Motion in Arrest of Judgment having been overruled, the defendant by his attorney, James A. O'Shea, excepted to the rulings of the court on the matters of law contained in the Motion in Arrest of Judgment, which exceptions were duly noted by the Court upon its minutes, and thereupon, the defendant, by his attorney, James A. O'Shea, gave notice in open Court at the time of said rulings, of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a Writ of Error. And thereupon on the 4th day of January, A. D. 1919, the foregoing sentence was formally imposed.

The defendant, Frank Leitch, by his counsel, James A. O'Shea, therefor- prays the Court to settle, sign and seal this his Bill of Exceptions, which is accordingly done nunc pro tunc this 4th day of January, 1919.

ROBERT HARDISON,
Judge Police Court.

49 January 4th, 1919.—Motion to Certify to Court of Appeals, D. C., presented, signed, sealed, and filed.

50 In the Police Court of the District of Columbia.

U. S., No. 223464.

UNITED STATES

VS.

FRANK P. LEACH, Defendant.

Now comes the defendant, Frank P. Leach, by his attorney, James A. O'Shea, and moves this Honorable Court to certify the above entitled cause to the Court of Appeals of the District of Columbia in order that the said Court of Appeals may determine whether the above entitled cause, wherein an information charged the defendant with sending, shipping, transporting and carrying within the five mile zone a certain quantity of liquor, commonly called whiskey is a violation of the law.

The foregoing motion is granted and the question thereby raised is hereby certified to the Court of Appeals of The District of Columbia.

ROBERT HARDISON,
Judge Police Court, D. C.

Given under my Hand and the Seal of the Police Court of the District of Columbia, this 4th day of January, A. D. 1919.

J. B. EGGLESTON,
Deputy Clerk Police Court.

51 January 4th, 1919.—Assignments of Error Filed. Designation of Record Filed.

52

In the Police Court of the District of Columbia.

No. 223464.

UNITED STATES

VS.

FRANK LEACH, Defendant.

Assignments of Error.

The Court erred as follows:—

1. In overruling the demurrer to the information.
2. In overruling the Motion for a Bill of Particulars.
3. In permitting the witness Thaddeus R. Bean to give an opinion as to the passengers, the class of passengers that witness had seen on the Washington, Baltimore & Annapolis Electric trains, and in permitting the witness Bean to draw a distinction in reference to the appearance between the trains of the Washington, Baltimore & Annapolis Electric line.
4. In refusing to strike out the testimony of the witness Joseph Dellamico as to his duty, respecting the trains of the Washington, Baltimore & Annapolis Electric Railroad Company.
5. In permitting the witness Delamico to give his opinion as to the difference between certain trains of the Washington, Baltimore & Annapolis Electric Line and the difference in the character of passengers carried on these trains.
- 53 6. In permitting the witness Delamico to state that "Quite a number of the colored people on the Washington, Baltimore & Annapolis train had been around Police Court and some had been convicted".
7. In refusing to strike out all of the testimony of the witness Delamico on the ground that what may have been done for six weeks preceding the day on which defendant took the train could not be taken as evidence against him.
8. In refusing to dismiss the case against the defendant on the evidence as adduced by the Government without any proof being introduced by the defendant because the defendant when arrested gave a reasonable explanation of its possession.
9. In refusing to dismiss the defendant on the testimony offered by the Government because the Governments had not shown as alleged in the information that the alcohol was brought into the District of Columbia "unlawfully".
10. In holding that it was not necessary for the Government to prove that the offense was committed unlawfully.
11. In refusing to dismiss the defendant at the close of the defendant's testimony.
12. In refusing to sustain defendant's motion in arrest of Judgment.

JAMES A. O'SHEA,
Attorney for Defendant.

54 In the Police Court of the District of Columbia.

No. 223464.

UNITED STATES

vs.

FRANK P. LEECH.

Docket Entries.

55 In the Police Court of the District of Columbia.

No. 223464.

UNITED STATES

vs.

FRANK LEACH, Defendant.

To the Clerk of the Police Court:

The defendant designates the following to constitute the record on the Writ of Error allowed him in the above entitled cause.

1. The information.
2. The demurrer.
3. Motion for Bill of Particulars.
4. Verdict.
5. Motion in Arrest of Judgment.
6. Judgment of sentence.
7. Bill of Exceptions.
8. Motion to Certify to the Court of Appeals.
9. Assignments of Error.
10. This Designation.

JAMES A. O'SHEA,
Attorney for Defendant.

56 December 7th, 1918.—Demurrer Filed and Argued.
December 9th, 1918.—Demurrer Overruled. Motion for
Bill of Particulars Filed, and Overruled. Defendant Arraigned.
January 4th, 1919.—Sen. 50—30 days.
Motion in Arrest of Judgment Filed, Argued, and Overruled.
Bill of Exceptions Presented, Signed, Sealed, Settled, and Filed.

Motion to Certify to Court of Appeals, D. C., Presented, Signed, Sealed, and Filed.

Assignments of Error Filed.

Designation of Record Filed.

January 16th, 1919.—Writ of Error received from Court of Appeals, D. C.

57 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, J. B. Eggleston, Dep. Clerk of the Police Court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 56 inclusive, to be true copies of originals in cause No. 223464 wherein the United States is plaintiff and Frank P. Leech defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, the City of Washington, in said District, this 29th day of January, A. D. 1919.

[Seal Police Court of District of Columbia.]

J. B. EGGLESTON,
Deputy Clerk Police Court, Dist. of Columbia.

58 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Robert Hardison, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between United States of America, Plaintiff, and Frank Leitch, Defendant, (Information No. 223,464,) a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

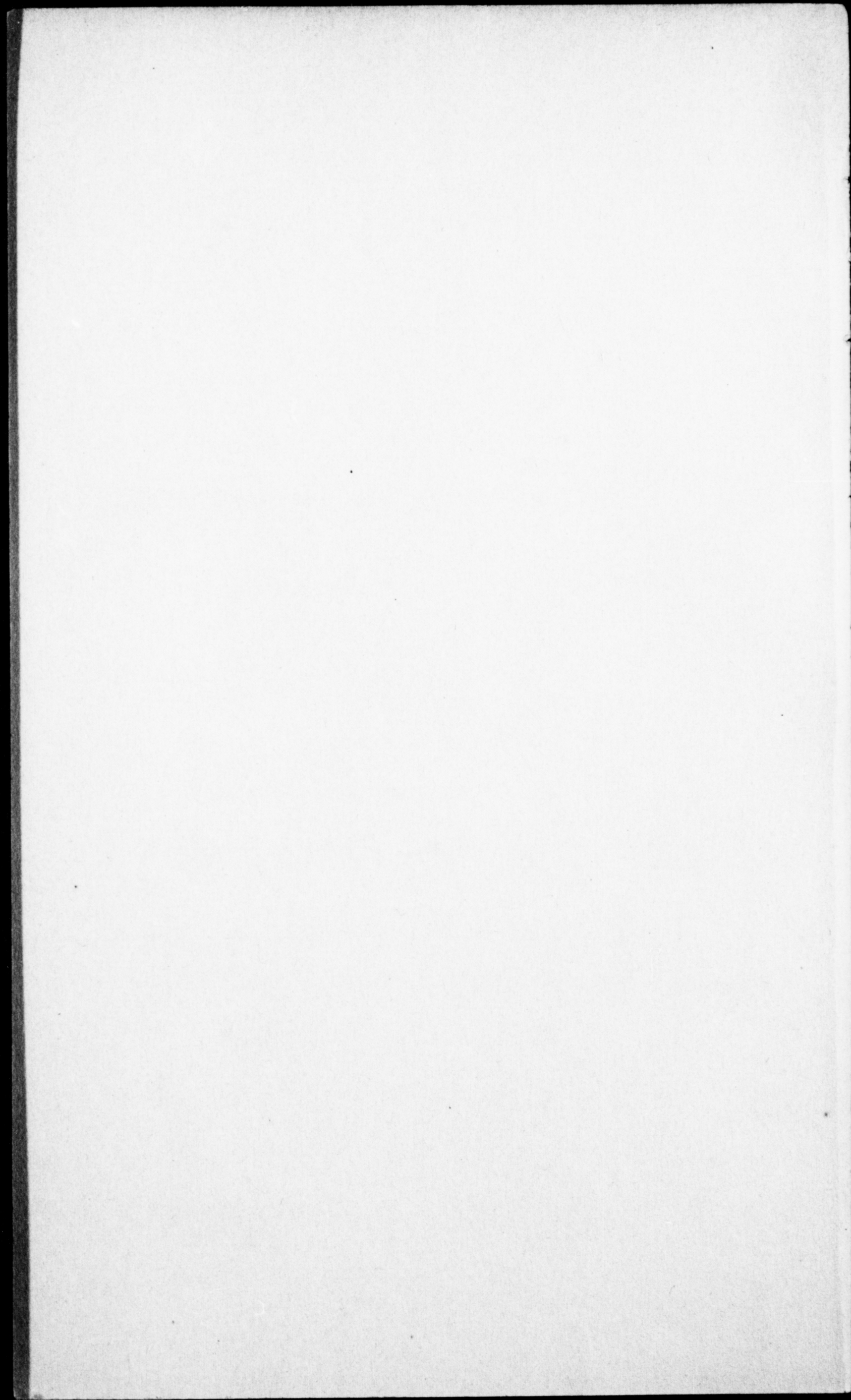
Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 16th day of January, in the year of our Lord one thousand nine hundred and nineteen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia.*

Allowed by
CHAS. H. ROBB,
*Associate Justice of the Court
of Appeals of the District of Columbia.*

Endorsed on cover: District of Columbia Police Court. No. 3247. Frank Leitch, plaintiff in error, vs. United States of America. Court of Appeals, District of Columbia. Filed Jan. 30, 1919. Henry W. Hodges, clerk.



In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.

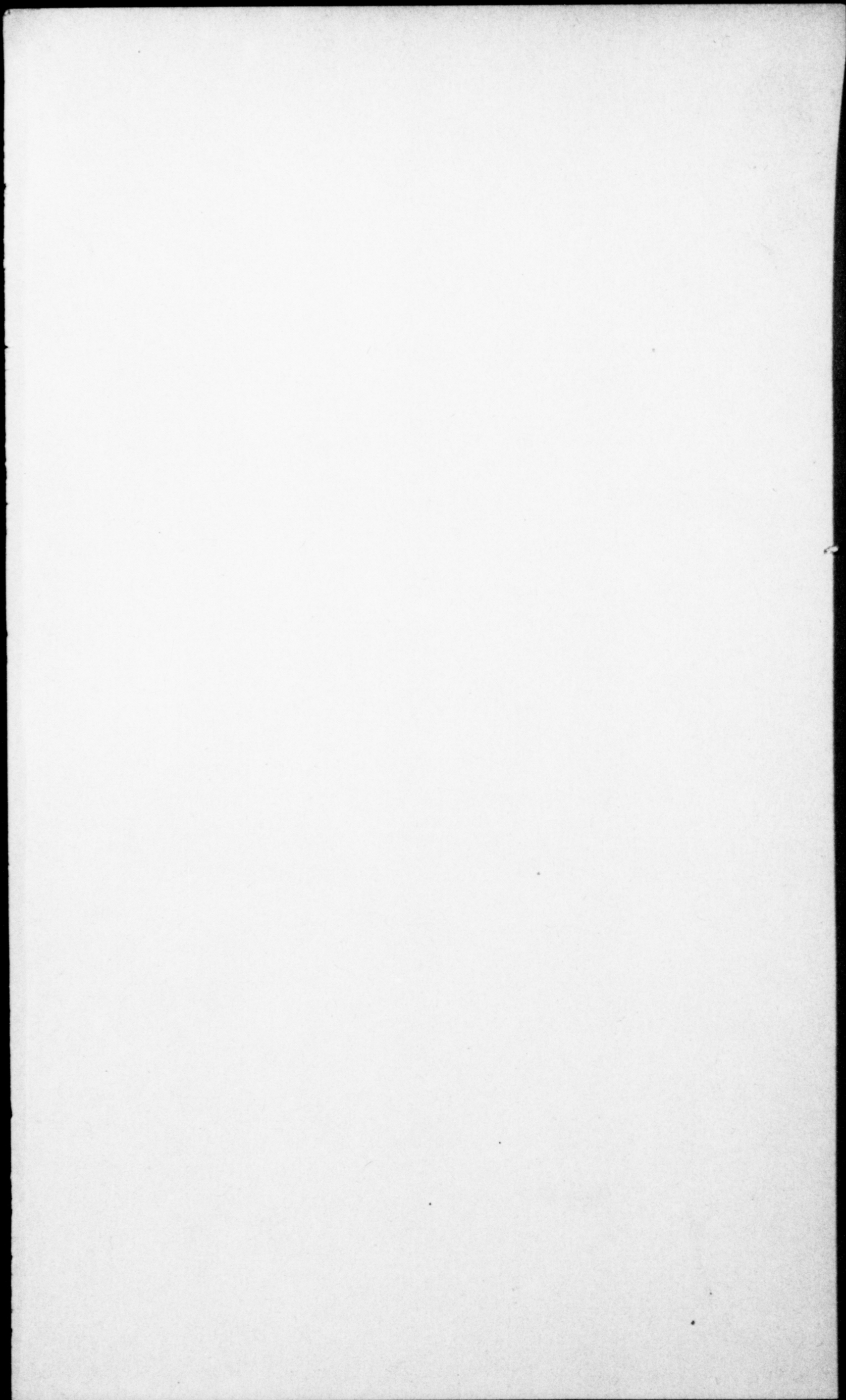
No. 3247

FRANK LEACH, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

**IN ERROR TO THE POLICE COURT OF THE
DISTRICT OF COLUMBIA.**

BRIEF ON BEHALF OF APPELLANT.

JAMES A. O'SHEA,
Attorney for Appellant.



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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. _____

FRANK LEACH, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

The appellant herein, Frank P. Leach, was convicted in the Police Court of the District of Columbia, in the United States branch, jury trial having been waived, of an alleged violation of a presidential proclamation issued on July 3, 1918. After establishing a zone around military camps this regulation provided that it shall be unlawful to knowingly ship, transmit, carry or transport alcoholic liquor to any place within such zone, provided that the regulation should not apply to the shipping, transmitting, carrying or transporting of liquor to a private home for use. Appellant applied to this honorable court for a writ of error.

Section 12 of an Act of Congress authorizing the President of the United States to increase temporarily

the military establishment of the United States, approved May 18, 1917, C. 15, 40 Stat., p. 76, which applied to this case, will be found in Bulletin 35, issued by the War Department and reads as follows:

"That the President of the United States, as Commander-in-Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable; Provided, that no persons, corporation, partnership, or association, shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both."

The following regulations are established by the President and the Secretary of War, to continue during the present emergency, and shall supersede all former regulations issued under the aforesaid authority, except the regulation of March 2, 1918, relating to the Island of Oahue, Territory of Hawaii:

"Around every military camp at which officers and enlisted men, not less than two hundred and fifty in number, have been or shall be stationed for more than thirty consecutive days,

there shall be for the purposes set forth in this regulation a zone five miles wide (except that within the existing limits of an incorporated city or town, within which the sale of alcoholic liquor shall not be prohibited by the State or local law), the zone shall not include any territory more than one-half mile from the nearest boundary of such camp. Alcoholic liquor, including beer, ale, and wine, either alone or with any other article, shall not, directly or indirectly, be sold, bartered, given, served, or knowingly delivered by one person to another, within any such zone, or sent, shipped, transmitted, carried or transported to any place within any such zone; provided, that this regulation shall not apply to the giving or serving of such liquor in a private home to members of the family or bona fide guests, other than members of the military forces, or to the sending, shipping, transmitting, carrying or transporting of such liquor to a private home for use as aforesaid; provided, also, that this regulation shall not apply to the sale or gift of such liquor by registered pharmacists, to licensed physicians or medical officers of the United States for medicinal purposes, or to the sending, shipping, transmitting, carrying or transporting of such liquor to registered pharmacists, licensed physicians or medical officers of the United States for use as aforesaid.

"Alcoholic liquor, including beer, ale and wine, either alone or with any other article, shall not directly or indirectly be sold, bartered, given, served, or knowingly delivered to any officer or member of the military forces, within the United States, their territories or possessions or any place under their control except to medical officers for medicinal purposes, or when administered by or under the direction of a licensed physician or medical officer.

"3. The sale or supply of intoxicating liquors to licensed physicians and medical officers for medicinal purposes, and the possession, use and

administration thereof by such physicians and officers for medicinal purposes, at any military station, cantonment, camp, fort or post is permitted."

All prior violations of former regulations and all penalties incurred thereunder shall be prosecuted and enforced in the same manner and with the same effect as if these superseding regulations had not been established.

WOODROW WILSON.

The White House, June 27, 1918.

NEWTON D. BAKER,
Secretary of War.

War Department, June 27, 1918.

(250,11AGO)

By order of the Secretary of War:

PAYTON C. MARCH,
General, Chief of Staff.

Official:

H. P. McCain,
The Adjutant General.

Washington, Government Printing Office, 1918.

An information was filed against the defendant charging on the oath of one . . . Thaddeus R. Bean, that . . . one Frank P. Leach, at the District aforesaid and within the jurisdiction of this court did then and there unlawfully and knowingly ship, carry and transport certain intoxicating and spirituous liquors, commonly called whiskey into the District of Columbia and into a zone five miles wide from the nearest boundary of a certain military camp (Rec., pp. 1-2).

To this information defendant demurred (Rec., p. 2) on the ground that the information failed to state in law a crime (Rec., p. 3). This demurrer was overruled and after an opinion filed by the Honorable Judge Hardison of the Police Court of the District of Columbia, which will be found on record pages 5, 6, 7, 8, an exception was noted (Rec., p. 8).

A motion for a bill of particulars was filed (Rec., p. 9), and this being overruled, an exception noted (Rec., p. 9).

It will appear from the evidence of one Thaddeus R. Bean, Sergeant of the Metropolitan Police Force of the District of Columbia, who stated that on the day defendant was arrested, a train which was designated as the "Bootleg" Special, stopped in the yards of the Washington, Baltimore and Annapolis Electric Company at 15th and H Streets, Northeast, and over the objection and exception of plaintiff in error, witness was permitted to give his opinion as to the class of people that traveled upon that train (Rec., pp. 9, 10).

Witness Bean arrested the defendant who got off this train; that he had "this suit-case, which contained eight quarts of whiskey, two bottles of gin, one bottle of brandy and one bottle of rum, that was broke" (Rec., p. 10).

It was further stipulated for the purposes of this case that the White House Station at which plaintiff in error was arrested was within five miles of Camp Meigs; that Camp Meigs was such a camp as would come within the proclamation heretofore referred to, and it was further agreed that the District of Columbia was a District in which the sale of alcoholic and intoxicating liquor was prohibited, and it was further agreed that the proclamation in this case was a presidential proclamation.

On Cross-Examination: It developed that witness has seen this train three times, sometime in the last month and a half. That the basis of witness' statement that this was the "Booze Special" was through some people standing around who stated "here comes the Booze Special" (Rec., p. 10); that a lot of freight is handled at 15th and H Sts. N. E., and none is unloaded at 15th and N. Y. Ave. N. W., as witness

knows of. That witness has no personal knowledge that the Railroad Company would not permit people with packages to go to 15th and N. Y. Ave. N. W. (Rec., p. 10); that witness did not ask defendant whether this liquor was for his family, but that defendant stated after the arrest that he had gotten this for his own personal use. That he had stated this while they were standing there waiting for the wagon to go away. Witness did not know whether this had an affidavit attached. Witness has never seen an affidavit such as is required under the Shepherd law.

Joseph Dellamico, another witness on behalf of the United States, gave testimony tending to show that, over certain objections made by the plaintiff in error, facts concerning the alleged "Bootleg Special."

Wm. F. Burke, another witness on behalf of the Government, stated that he was with Sergeant Bean on the 5th day of December, at 15th and H Sts. N. E., at the Washington, Baltimore and Annapolis Electric Company's yards; the defendant got off the train at 7.15; and as he came off the step of this train the Sergeant arrested him and turned him over to witness. He had eight quarts of whiskey, two bottles of gin and a bottle of wine.

Cross-Examination: It developed that the witness did not ask the defendant what he had the wine and liquor for, but the defendant told him that he had it for his own use (Rec., p. 12).

At the close of the Government's case plaintiff in error requested the court to dismiss him without any proof being introduced by him because of the fact that when arrested defendant gave a reasonable explanation (Rec., pp. 12, 13).

The defense introduced William L. Wagner whose testimony was to the effect that he was Traffic Manager of the Terminal Taxicab Company, and had known

the defendant since the 28th of April, 1918, during which time defendant had been in his employ as a driver, and was considered one of the best drivers they had. That he does not know of his ever being locked up and his reputation for peace and good order is good and in response to the court's questioning, said "that those who know him say his conduct is excellent."

On Cross-Examination: It was developed that his duty was to meet trains and take passengers to hotels or any other place and from hotels, residences and any other place to the railroad station; that part of his duty would be to take strangers.

Mrs. Lydia Leach, the wife of the defendant, testified that she remembers her "husband going to Baltimore the other day"; that he went to get "some whiskey and wine, the wine for jelly and the brandy and rum was for fruit cake and pies for me, and the whiskey was to have in the house in case of sickness if we should need it" (Rec., p. 15).

Cross-Examination: Witness did not notice the exact time that her husband left the house and she did not say anything to him about bringing back eight quarts of whiskey; that she left it to him; that it was his first trip over and he stated he thought he would get that quantity before it advanced in price.

Witness replied to the court's questioning that she had been married twelve years; that she and her husband had lived together since marriage and she has never seen him intoxicated in her life; his occupation is that of a mechanic and chauffeur; that they have two children and live at 1002 Girard St. N. W., this city; that she does not know her husband's income exactly; that he workd on a percentage and witness guesses his income is from seventy-five to one hundred dollars per month; that they pay ten dollars per month for flat and their expenses are from sixty-five to seventy-

five dollars per month; that her husband has no property, no account in bank and depends upon his monthly salary. That witness' husband took fifty dollars and she told him to get wine and rum and brandy for her to use in the house and whiskey to keep; that they had not had whiskey in the house for a long time, but that she aimed to have a little in the house. That her husband said he would get it before it advanced in price ; that her husband does not drink to speak of; that witness did not habitually drink whiskey (Rec., p. 15).

Frank Leach, defendant, testified that he had never been to Baltimore on any other train. It was his first trip. He had never brought in any liquor from Baltimore before. That he paid two dollars and ten cents (\$2.10) a quart for the whiskey; one dollar and seventy-five cents (\$1.75), or one dollar eighty-five (\$1.85), for the wine; one dollar and forty-five cents (\$1.45) for the brandy and for the sherry and port, sixty cents; that the whole bill amounted to twenty-three dollars and sixty-five cents (\$23.65); that the purpose of the witness in getting the whiskey was mostly "to keep"; that he had heard that liquor was going to advance in price; that they were going to stop making it; that the wine was for Christmas purposes, for my wife's pies (Rec., p. 16); that they were not quarts but fifths of gallon; that he did not know what train to get on, but he told his wife that he would try and get back at twelve o'clock to go to work; that he told Mr. Collins that he would come back that afternoon; Mr. Collins asked him why he wanted to get off and he told him to go to Baltimore to get some liquor; that he heard it was going to advance in price; that he said, "All right, they would hold my car for me." When I did catch that train it was quite a surprise to me. When I got off they told me I was under arrest, and I asked them

what for and they said, "Never mind; line up." So I got on the outside there and they said we were arrested for bootlegging and I asked them what that meant and they tried to explain, and I told them that I had gotten this stuff for my own personal use. I did not know anything about there being such a train. They would not let me on any other train in the station. I asked them why and they said you are not allowed to carry whiskey.

That then and there the following occurred (Rec., p. 17):

By the Court: "Why did you get such a vast and varied assortment?"

A. "For Christmas. They use brandy and rum for cakes and jellies. I suppose they are used for that, I am no cook."

That his wife's mother comes up sometimes and suffers sometimes from some kind of a pain and she likes a little gin (Rec., p. 17).

That witness stated his monthly percentage would run anywhere from probably one hundred dollars and I would almost average as much as that in tips. That his income is about two hundred dollars per month. That he has no bank account but his wife has; witness does not know what her account is but expects it is some three or four hundred dollars. That he turns over all his money to his wife and when he wants any he gets it from her. That yesterday his percentage was six dollars and eighty-two cents (\$6.82). Witness does not work on a salary but works on a percentage.

That then and there after argument the court stated that he would sentence the defendant to pay a fine of fifty dollars or in default to serve thirty days in jail and defendant noted an appeal to this Honorable Court.

Assignments of Error.

The court erred as follows:

1. In overruling the demurrer to the information.
2. In overruling the motion for a bill of particulars.
3. In permitting the witness, Thaddeus R. Bean, to give an opinion as to the passengers, the class of passengers that witness had seen on the Washington, Baltimore & Annapolis electric trains, and in permitting the witness Bean to draw a distinction in reference to the appearance between the trains of the Washington, Baltimore and Annapolis electric line.
4. In refusing to strike out the testimony of the witness Joseph Dellamico as to his duty respecting the trains of the Washington, Baltimore & Annapolis Electric Railroad Company.
5. In permitting the witness Delamico to give his opinion as to the difference between trains of the Washington Baltimore & Annapolis electric line and the difference in the character of passengers carried on these trains.
6. In permitting the witness Dellamico to state that, "Quite a number of the colored people on the Washington, Baltimore & Annapolis train had been around Police Court, and some had been convicted."
7. In refusing to strike out all of the testimony of the witness Dellamico on the ground that what may have been done for six weeks preceding the day on which defendant took the train could not be taken as evidence against him.
8. In refusing to dismiss the case against the defendant on the evidence as adduced by the Government without any proof being introduced by the defendant because the defendant when arrested gave a reasonable explanation of its possession.

9. In refusing to dismiss the defendant on the testimony offered by the Government because the Government had not shown as alleged in the information that the alcohol was brought into the District of Columbia, "unlawfully."

10. In holding that it was not necessary for the Government to prove that the offense was committed unlawfully.

11. In refusing to dismiss the defendant at the close of defendant's testimony.

12. In refusing to sustain defendant's motion in arrest of judgment.

ARGUMENT.

For the more orderly discussion of the questions raised the assignments of error will be grouped.

1. Assignments 1 and 2 will deal with the refusal to sustain the demurrer and to grant a bill of particulars.

2. Assignments 3, 4, 5, 6 and 7 relate to the introduction of evidence against defendant by which it was claimed the defendant was prejudiced.

3. Assignments 8, 9, 10 and 11 deal with the refusal to dismiss the case against the defendant.

4. Assignment 12 deals with the refusal to sustain defendant's motion in arrest of judgment.

I.

The overruling of demurrer and denial of the bill of particulars was error.

Conceding only for the sake of argument the validity of the Presidential Proclamation, should the United States have alleged in its information that the defendant was not shipping, transporting and carrying for his

own use? Should the proviso in this proclamation have been set forth? Was it sufficient to give defendant notice of what he was charged with?

The information should allege the exception.

U. S. vs. Cook, 17 Wall., 168.

Ledbetter vs. U. S., 170-606.

Shelp vs. U. S., 81 Fed., 694.

Maxwell vs. Dawson, 151 U. S., 605.

A proviso is something engrafted upon an enactment, and is used for the purpose of taking special cases out of the general act and providing especially for them.

Dollar Savings Bank vs. U. S., 19 Wall. (U. S.)

Bank of Savings vs. Field, 3 Wall. (U. S.), 496.

The office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview.

Gurley vs. Gurley, 8 Clark, 764.

Minnis vs. U. S., 15 Pet., 445.

It is urged by the United States that the case of *Lehman vs. D. C.*, 19 D. C. App., 217, should control, and in the opinion of the Honorable Justice Hardison, this was the controlling case (see Rec., p. 7), but to this we do not agree in view of the liquor laws of the District of Columbia.

This proviso was part and parcel of this offense.

The law of District of Columbia, known as an "Act to prevent the manufacture and sale of alcoholic liquors in the District of Columbia," permitted defendant to bring liquor in—defendant told the police when he got off the train he had it for his own use (Rec., p. 11),

and yet he was arrested, had his picture taken and was locked up.

In *United States vs. Carney*, 228 Fed. Rep., 163, the defendant was charged with having in his possession "knowingly and unlawfully," one hundred and forty tablets containing one fourth grain of morphine. A demurrer was sustained because the exceptions were not set out.

This should have been done in the present case.

II.

Assignments of error 3, 4, 5, 6, and 7 all relate to the introduction of evidence against the defendant, and a reading of the evidence will show that the defendant was prejudiced.

The court sat as judge of the law and fact and despite the evidence that defendant was never seen on any of these so-called liquor trains (Rec., p. 12) before, the court heard and permitted witnesses to give opinions not only as to the class of people (Rec., pp. 9, 10) that was on this train, but also the particular class of that class (Rec., p. 10); to draw differences between the trains (Rec., p. 10).

III.

The third head relates to assignments 8, 9, 10, 11, to dismiss defendant at close of U. S. Case (Rec., pp. 12, 13) and at the close of defendant's case.

Defendant's right to have a charge alleged against him properly, as claimed by his demurrer, was denied and yet after the Government had failed to make out a case against him as he claimed, he is put to the proof and is advised that the fact he had intoxicating liquor here is enough to make him guilty (Rec., p. 13).

It is respectfully urged that the case as made out by Government did not warrant a conviction, and when

the defendant introduced its testimony and the case was closed, he should have been acquitted.

The fact shown did not as matter of law prove the guilt of the defendant.

Coffin vs. U. S., 156 U. S., 432.

Kirby vs. U. S., 174 U. S., 47.

IV.

The motion in arrest of judgment, containing as it did, some twenty-two grounds, seeks to have this court review the action of the trial court. It will be endeavored to group the various ground of the motion in arrest of judgment, so that an intelligent discussion may be had, and in doing this it may become necessary to invert the order in which the grounds of the motion in arrest of judgment are stated. To this end—

- A. The first five reasons of the motion in arrest of judgment, deal with the overruling of the demurrer and the refusal to sustain the right of a bill of particulars.
- B. Grounds 6, 7, 10, 12, and 17 attempt to discuss the question of interstate commerce.
- C. Grounds 8, 9, 11, treat of the constitutionality of the Presidential Proclamation.
- D. Grounds 14, 15, 16, 21 and 22 attempt to compare the Shepherd Law with the Presidential Proclamation.

A.

It will not be necessary to discuss the demurrer or the bill of particulars again, as these questions were sufficiently covered in the early part of the argument.

B.

**Was the Presidential Proclamation in Contravention
of the Interstate Commerce Clause of the Consti-
tution of the United States?**

It will be noted that the liquor in this case was bought and paid for in Baltimore, in the State of Maryland, and was carried for personal use to Washington, in the District of Columbia, over an interstate trolley line and was interstate commerce. The facts are: That the defendant purchased the liquor in Baltimore, for his personal use as a beverage, intending to carry it into the District of Columbia, where the laws forbade the manufacture and sale of intoxicating liquors, for beverage purposes, but did not prohibit them for personal use. It will be noted that after he alighted from a trolley car, operated by a common carrier of interstate commerce, he was arrested.

Congress has the power to forbid altogether, or to any extent that it may deem advisable, the interstate movement of intoxicating liquor, but it is the contention of counsel for the appellant that Congress alone has this power and the Congress did not forbid the interstate movement of intoxicating liquors to the District of Columbia, and consequently, this Presidential Proclamation could not forbid it. Appellant should have had a reasonable time in which to complete his transportation of the liquor bought in Baltimore, and until it was complete transportation, the liquor was in interstate commerce.

Kirmeyer vs. Kansas, 236 U. S., 569.

The transportation of passengers or property from State to State by whatever means or by whomever accomplished is in itself and without more, interstate commerce.

Gibbons vs. Ogden, 9 Wheat., 1, 188.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, 203.

Brown vs. Maryland, 12 Wheat., 419, 446.

Second Employers' Liability Cases, 223 U. S., 1, 46.

International Textbook Co. vs. Pigg, 217 U. S., 91, 107.

Butler Bros. Shoe Co. vs. United States Rubber Co., 156 Fed. Rep., 1.

Lottery Case, 188 U. S., 321, 345.

Railroad vs. Husen, 95 U. S., 465, 469-70.

Kirmeyer vs. Kansas, 236 U. S., 568, 572.

Kelley vs. Rhoads, 188 U. S., 1.

Pipe Line Cases, 234 U. S., 548.

Rearick vs. Pennsylvania, 203 U. S., 507, 512.

Coe vs. Errol, 116 U. S., 517.

In this case the liquor was carried by appellant, who in turn was being carried by an interstate common carrier, and hence the liquor, as well as appellant, were in interstate commerce.

U. S. vs. Chavez, 228 U. S., 308, 323.

See also, *U. S. vs. Dan Hill*, 248 U. S.

In the *Dan Hill* case there was a writ of error to the District Court of the United States for the Southern District of West Virginia, to quash the indictment charging a violation of what is known as the Reed amendment, being a part of section 5 of the post office appropriation act, approved March 3, 1917 (39 Stat., 1058, 1069), which is as follows:

. . . Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale

therein of intoxicating liquors for beverage purposes shall be punished as aforesaid; provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state.

It appeared that the defendant in error, while in Kentucky, purchased a quart of intoxicating liquor for his personal use as a beverage, and intended to carry it into West Virginia, where the laws forbade the manufacture and sale of intoxicating liquor for beverage purposes, and he did in fact carry it on his person, while riding on a trolley car engaged as a common carrier in interstate commerce in the State of West Virginia.

The learned district judge drew the distinction between "interstate transportation" and "interstate commerce," and held that while the liquor in question was transported into a dry State from another State, it was not transported "in interstate commerce" because intended for defendant's personal use and not for the purposes of trade.

The Supreme Court of the United States held that it was a violation of the Reed Amendment to so transport liquor.

In the case before this honorable court, the Presidential Proclamation which was issued under the authority of 40 Stat., had no right to deny appellant the privilege of transporting liquor, because he was on a common carrier and the Reed Bone Dry Amendment did not apply to the District of Columbia.

This is an unreasonable regulation to prohibit to the citizen the right to have alcoholic liquor.

15 R. C. Law., p. 263.

It was not unlawful for appellant to purchase liquor

for his own use, where it was lawfully sold, and he had the right to carry it to his own home.

Adams Express Company *vs.* Kentucky, 238
U. S., p. 190.

V.

Did the Presidential Proclamation supersede and repeal the Act of March 3, 1917, known as Chapter 165, 64th Congress, Second Session and approved March 3, 1917, No. 1. Public Laws, p. 1123, which is as follows:

An Act to prevent the manufacture and sale of alcoholic liquors in the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the first day of November, Anno Domini nineteen hundred and seventeen, no person or persons, or any house, company, association, club, or corporation, his, its, or their agents, officers, clerks, or servants, directly or indirectly, shall, in the District of Columbia, manufacture for sale or gift, import for sale or gift, sell, offer for sale, keep for sale, traffic in, barter, export, ship out of the District of Columbia, or exchange for goods or merchandise, or solicit or receive orders for the purchase of, any alcoholic or other prohibited liquors for beverage purposes or for any other than scientific, medicinal, pharmaceutical, mechanical, sacramental, or other nonbeverage purposes.

Wherever the term "alcoholic liquors" is used in this Act it shall be deemed to include whisky, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, all malt liquors, and all other alcoholic liquors.

That any person or persons, or any house,

company, association, club, or corporation, his, its, or their agents, officers, clerks, or servants, who shall directly or indirectly violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$300 nor more than \$1,000, and shall be imprisoned in the District jail or workhouse for a period of not less than thirty days nor more than one year for each offense.

It will be noted from a reading of the above that it was permissible to import into the District of Columbia, alcoholic liquor for beverage purposes, except for sale or gift. This was the express Act of Congress:

Section 2 (a) indicated the manner in which railroads, steamboat and other boat companies, express and transportation companies might transport intoxicating liquor into the District, and insisted that they be required to alphabetically arrange all the names of persons to whom intoxicating liquors are shipped.

Section 5 (a) provided that the parties should sign affidavits when they used common carriers.

Section 6 provided that the shipment should not be delivered except during certain hours.

Congress had legislated fully on this subject and had it been the intention of Congress to prevent the bringing in of liquor it is urged that Congress would have done so at that time.

What is known as the Reed Bone Dry Amendment was first announced in Chap. 162, Sec. 5-39, Stat., 1069, and went into effect July 1, 1917, by act of March 4, 1917, Chap. 192, 40 Stat., 1202. The Act to prevent the manufacture and sale of alcoholic liquors in the District of Columbia, and for other purposes, is also found in 39 Stat. No. 1, Public Laws, p. 1123. In fact it was not until the Revenue Act of 1918, approved March 3, 1919, that the Reed Bone Dry Amendment was applied to the District of Columbia.

Section 12, of the Act approved May 18, 1917, 40 Stat., 76, Chap. 15, entitled "An Act to authorize the President to increase temporarily the military establishment of the United States, provided that the President of the United States, as commander-in-chief of the army, is authorized to make *such regulations governing the prohibition of alcoholic liquor in or near military camps and to the officers and enlisted men of the army as he may from time to time deem necessary or advisable.*" Acting under the supposed authority contained therein, the President promulgated the Proclamation under which this defendant was charged.

It is respectfully submitted that the appellant, who was not a soldier or officer, should have been dismissed, because Congress having legislated for the District of Columbia, upon the question of intoxicating liquor, it was not within the power of the President of the United States to make any regulation which would in effect supersede and annul the act entitled "An Act to prevent the manufacture and sale of alcoholic liquors in the District of Columbia, and for other purposes."

This is what the proclamation did.

The information in this case provided that the defendant—

"did then and there willfully, unlawfully and knowingly, ship, carry and transport certain intoxicating and spirituous liquor commonly called whiskey into the District of Columbia, and into a zone five miles wide from the nearest boundary of a certain military camp of the United States, to wit: Camp Meigs, in the District of Columbia, in which said camp not less than two hundred and fifty officers and enlisted men have been stationed, for more than thirty consecutive days, the said District of Columbia, then and there being a city, town and District, within which the sale of alcoholic liquors is prohibited by local law against the form of the

statute in such case made and provided, and against the peace and government of the United States of America,"

and it is respectfully urged that the defendant violated no law when he brought the liquor in as he did. This Act of March 3, 1917, permitted the defendant to do what the Presidential Proclamation denied him the right to do. The Act entitled, "An Act to prevent the manufacture and sale of alcoholic liquors," applied solely and exclusively to the District of Columbia, and the Presidential Proclamation applied to the United States in general. The Presidential Proclamation being in the nature of a general regulation affecting the United States had no particular application to the District of Columbia, in so far as it prevented the defendant the right to bring in liquor for his own use. A reading of the proclamation will show that it referred solely and entirely to soldiers—enlisted men and officers.

The power to regulate transactions between citizens was not contemplated by the acts of Congress found in 40 Stat., ch. 15, and consequently the regulation, as in the instant case, was an assumption of power. The regulation is unconstitutional as delegating legislative power to the President of the United States and the Secretary of War. This regulation attempted to read violations into the Act of Congress which the framers of this act did not intend. The act dealt only with enlisted men and officers. Mere citizens were not affected, and to read such a meaning into the act and regulation is stretching the imagination too far.

For the reasons herein it is respectfully insisted the conviction in this case should not stand, and the judgment should be reversed.

Respectfully submitted.

JAMES A. O'SHEA,
Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 24 1919

IN THE

Henry L. Hodges
Plaintiff
Court of Appeals, District of Columbia.

JANUARY TERM, 1919.

No. 3247.

FRANK LEACH, APPELLANT,

vs.

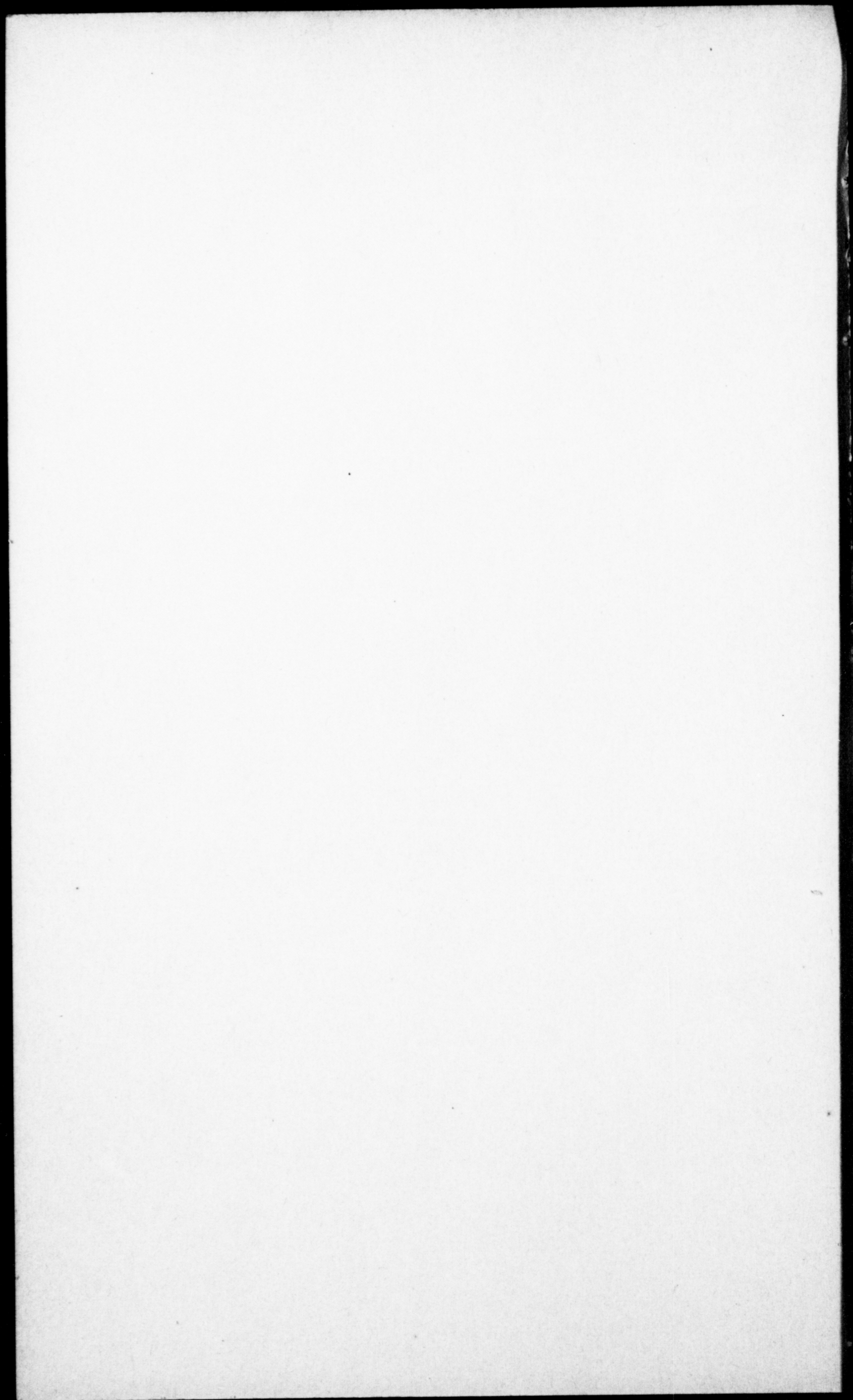
UNITED STATES OF AMERICA.

BRIEF FOR APPELLEE.

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Special Assistant U. S. Attorney for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



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UNITED STATES OF AMERICA.

BRIEF FOR APPELLEE.

The Case.

A writ of error to the Police Court of the District of Columbia brings here for review a judgment sentencing appellant, Frank Leach, to pay a fine of fifty dollars, or in default to be committed to jail for thirty days. Jury trial being expressly waived, the case was heard by the Court.

Section 12 of the act of Congress approved May 18, 1917, entitled, "An act to authorize the President to increase temporarily the military establishment of the United States," 40 Stat., 76, among other things, provides:

"That the President of the United States, as Commander-in-Chief of the Army, is authorized to make such regulations governing the *prohibition of alcoholic liquors in or near military camps and to the*

officers and enlisted men of the Army as he may from time to time deem necessary or advisable: Provided, That no person, corporation, partnership, or association, shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors ~~in or near~~ at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than one thousand dollars, or imprisonment for not more than twelve months, or both." (Italics ours.)

Under the authority vested in him by the act, the President on the twenty-seventh day of June, 1918, established regulations which, in so far as pertinent to this case, follow:

"1. Around every military camp at which officers and enlisted men, not less than two hundred and fifty in number, have been or shall be stationed for more than thirty consecutive days, there shall be for the purposes set forth in this regulation a zone five miles wide, except that within the existing limits of an incorporated city or town, within which the sale of alcoholic liquor shall not be prohibited by the State or local law, the zone shall not include any territory more than one-half mile from the nearest boundary of such camp. *Alcoholic liquor, including beer, ale, and wine, either alone or with any other article, shall not, directly or indirectly, be sold, bartered, given, served, or knowingly delivered by any person to another, within any such zone, or sent, shipped, transmitted, carried or transported to any place within any such zone; provided, that this reg-*

ulation shall not apply to the giving or serving of such liquor in a private home to members of the family or *bona fide* guests, other than members of the military forces, or to the sending, shipping, transmitting, carrying or transporting of such liquor to a private home for use as aforesaid; provided, also, that this regulation shall not apply to the sale or gift of such liquor by registered pharmacists, or licensed physicians and medical officers of the United States for medicinal purposes, or to the sending, shipping, transmitting, carrying, or transporting such liquor to registered pharmacists, licensed physicians and medical officers of the United States for use as aforesaid." (Italics ours.)

Since these regulations are referred to throughout appellant's brief as a presidential proclamation, and since the principle involved would be the same in either event, they will hereafter be designated as a proclamation for the sake of clearness.

It was under this act, and the proclamation published pursuant to the act, that the information was filed, charging "that one Frank Leach, late of the District aforesaid, on the fifth day of December, in the year of our Lord one thousand nine hundred and eighteen, with force and arms, at the District aforesaid, and within the jurisdiction of this Court, did then and there wilfully, unlawfully and knowingly ship, carry, and transport certain intoxicating and spirituous liquor, commonly called whiskey, into the District of Columbia and into a zone five miles wide from the nearest boundary of a certain military camp of the United States, to wit, Camp Meigs, in the District of Columbia, in which said camp not less than two hundred and fifty officers and enlisted men have been stationed for more than thirty consecutive days, the said District of Columbia then and there being a city, town, and District within which the sale of alcoholic liquors is prohibited by local law, against the form, etc."

The testimony disclosed that the defendant was apprehended with a quantity of whiskey and other spirituous liquors in his possession within a zone five miles wide from Camp Meigs, a certain military camp of the United States, and within the jurisdiction of the Court. That Camp Meigs was such a camp as specified in the proclamation, and that the sale of alcoholic and intoxicating liquor was prohibited by local law, were stipulated between counsel.

Assignments of Error.

There are twelve assignments of error. The points chiefly relied upon by appellant, we take it, are, (1) that the information was bad for failure to negative the first proviso in the presidential proclamation; (2) that the proclamation was void and of no effect *ab initio*, as being unconstitutional and for other reasons. The argument of counsel for appellant in his brief does not follow the assignments of error, but places them in four groups; and, for the sake of uniformity, the case will be presented for the appellee in the same sequence, in so far as is practicable.

ARGUMENT.

Group I.

The Refusal of the Court Below to Sustain the Demurrer to the Information Was Not Error (Assignment 1).

It is claimed that the first proviso of the President's proclamation should have been negated and the negative averment proved.

The rule respecting the necessity of negating exceptions is well settled. Where the exception is in the enacting clause of the statute and is an essential part of the description of the offense, it must be negated; but where, as in this case, the exceptions are contained in separate and sub-

sequent clauses of the statute or in other statutes, they need not be noticed in the indictment or information, but may be shown as matters of defense.

Some courts have gone even further and held that though the exceptions were a part of the enacting clause, it need not be negatived unless it be an ingredient part of the description of the offense.

This Court has already passed upon the question here involved, in *Lehman vs. District of Columbia*, 19 App. D. C., 217, 224, a case identical in principle with the one at bar. Lehman was charged in two counts with selling intoxicating liquors on Sunday and with keeping his bar-room open on Sunday, in violation of section 6 of the act of Congress entitled "An act to regulate the sale of intoxicating liquors in the District of Columbia," 27 Stat., 563, which prohibited the sale of intoxicants, or the keeping open of bar-rooms on Sunday, with the proviso that the keeper of any hotel or tavern having a license under the act might sell intoxicating liquors to *bona fide* registered guests in his hotel at the meals or in the rooms of such guests on the Sabbath day. Motion in arrest of judgment, questioning the sufficiency of the information on the ground that it failed to negative the proviso in the statute, was overruled, and, affirming the ruling below, this Court said:

"It is therefore necessary and proper to negative apparent exception and immunity in so far only as such exception or immunity enters into the description of the alleged offense; but it is not necessary to anticipate excuse by alleging that there is no ground for such excuse. We might well illustrate the proposition if we supposed a statute wherein the prohibition was upon the sale of all intoxicating liquors, except wine. Evidently an information or indictment to the effect that the accused person sold intoxicating liquors without negating the fact that it was wine that was sold, might well be held insufficient, wherever in the statute the exception occurred; for the offense under the statute was not the sale of intox-

icating liquors, but the sale of such liquors other than wine. The definition of the offense might be held incomplete without the exclusion of the exception by negative averment. But if in the same statute provision was made, as it was made in our act of Congress of March 3, 1893, that certain persons, under certain circumstances, might sell intoxicating liquors without subjecting themselves to the penalties prescribed against all persons in general engaging in the traffic, it is very clear that it is for the accused person to bring himself within the category of persons so entitled to immunity, and to show the existence of the circumstances by virtue of which the immunity arises, and that it is not incumbent on the prosecutor to anticipate the defense. We are of opinion, therefore, that it was not necessary in the present case that the information should allege that the defendant did not come within the scope of the proviso concerning keepers of hotels and taverns."

In *Evans vs. United States*, 153 U. S., 584, 590, the Court said:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the Government may be entrapped into making allegations which it would be impossible to prove. The note may have been delivered for a score of honest purposes which it would be utterly impossible to anticipate. *Neither in criminal nor in civil pleading is it required to anticipate or negative a defense.*" (Italics ours.)

See also 1 Bishop Crim. Proc., sec. 638; 1 Chitty Crim. Law, 231.

In *United States vs. Cook*, 17 Wall., 168, 173, the Court, discussing fully the subject of exceptions and provisos, arrived at this conclusion:

"Where a statute defining an offense contains an exception in the enacting clause of the statute, which

is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; *but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused.*" (Italics ours.)

In *Nelson vs. United States*, 30 Fed., 112, 116, the Court said:

"As a rule an exception in a statute by which certain particulars are withdrawn from or excepted out of the enacting clause thereof, defining a crime concerning a class or species, constitutes no part of the definition of such crime whether placed close to or remote from such enacting clause. *And whenever the person accused of such a crime claims to be within such exception, it is more logical and convenient that he should aver and prove the fact than that the prosecutor should anticipate such defense and deny it.*" (Emphasis ours.)

In *Commonwealth vs. Shannihan*, 145 Mass., 99, it was said by the Court:

"This is a complaint under the public statutes, c. 98, sec. 2, which prohibits the keeping open of a shop, warehouse or workhouse on the Lord's Day. Sec. 2 of the Statute of 1887, c. 391, makes certain exceptions to this general provision; but according to the rule in this Commonwealth, such exceptions need not be negatived in the complaint or indictment; the complaint in this case sets forth the complete offense; if the defendant is within any of the exceptions it is a matter of defense."

In *Commonwealth vs. Hart*, 11 Cush. (Mass.), 130, 135, 137, there was a prosecution upon indictment under an act which provided that "No person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly authorized and appointed as aforesaid, * * * Provided, that nothing in this act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage; or the sale and use of the fruit of the vine for the commemoration of the Lord's Supper." Motion in arrest of judgment, in which it was claimed that it should have been alleged that the defendant was not within the proviso, was overruled. In sustaining the action of the trial court, it was said:

"But when the exception or proviso is in a subsequent substantive clause, the case provided for in the enacting or general clause may be fully stated without negating the subsequent exception or proviso. A *prima facie* case is stated, and it is for the party, for whom matter of excuse is furnished by the statute or the contract, to bring it forward in his defense. It is an elementary principle of pleading (except in dilatory pleas which are not favored) that it is not necessary to allege matter which would come more properly from the other side; that is, it is not necessary to anticipate the adverse party's answer and forestall his defense or reply. It is only when the matter is such that the affirmation or denial of it is essential to the apparent or *prima facie* right of the party pleading, that it must be affirmed or denied by him in the first instance."

In *State vs. Abbey*, 29 Vermont, 60, 66, 69, the defendant was indicted for bigamy. An exception in the act stated that it should not apply to persons whose spouses had been unheard of for seven years. The Court said:

"Cases excepted from the act necessarily do not define, qualify, or in any way affect the provisions of the enacting clause. It is a statutory provision over-

riding the whole act, that to these cases the act does not extend. In such cases exceptions need not be negatived, and are to be treated as matters of defense, and are to be relied upon by the respondent as such."

Further, the Court said in part:

"Neither does the question depend upon any distinction between the words 'provided' or 'excepted' as they may be used in the statute."

In the case of *Rex vs. Baxter*, 2 East P. C., 781, 5 Term, 83, the act under which the prosecution was brought provided "that in all cases where goods have been stolen, except where the person committing the felony shall have been already convicted, etc., every person who shall buy or receive such goods, knowing them to have been so taken, shall be deemed guilty, etc." It will be seen that the exception is contained in the enacting clause; still the Court held that it was matter of defense and need not be negatived in the indictment.

See also:

Commonwealth vs. Jennings, 121 Mass., 248.

State vs. O'Donnell, 10 R. I., 472.

Steel vs. Smith, 1 Barn. & Ald., 99.

It is evident, therefore, upon reason and by the overwhelming weight of authority, that a complete description of the offense was set out in this information, and that it was matter of defense for the appellant to bring himself within the proviso. The cases relied upon in appellant's brief in no way refute the contention here made, but rather strengthen it.

In *United States vs. Carney*, 228 Fed., 163, 169, a case relied upon by appellant, the prosecution was brought under an act of Congress providing:

"That it shall be unlawful for any person not registered under the provisions of this act, and who has

not paid the special tax * * * to have in his possession or under his control any of the aforesaid drugs," etc.

The Government failed to allege that the person charged was not registered, and the Court in holding that it should have been so alleged, since the exception was part and parcel of the enacting clause, said:

"The last proviso in section 8, however, 'that it shall not be necessary to negative any of the aforesaid exemptions in any complaint or indictment under this act,' is *but declaratory of the existing rule of pleading in the Federal courts in criminal cases. Exemptions from liability for offenses created by acts of Congress are matters of defense*; but matters excepted from the granting clause of the act are not within the terms of the act, and such matters must be negatived in the indictment or complaint." (Italics ours.)

Refusal to Grant Appellant's Motion for Bill of Particulars
(Assignment 2).

As to the refusal of the Court to require a bill of particulars, it is difficult to see what more the Government could have set out. The quantity of liquor brought in the prohibited zone is immaterial and therefore need not be set out, and it is submitted that the granting or refusal of the bill of particulars being within the sound discretion of the trial court, it will not be reviewed here in the absence of apparent abuse of that discretion.

See:

Dunlop vs. United States, 165 U. S., 491.

Rosen vs. United States, 161 U. S., 29, 35.

Ferry vs. King County, 141 U. S., 668.

Commonwealth vs. Giles, 1 Gray (Mass.), 466, 469.

Group II, Assignments 3, 4, 5, 6, and 7.*Admissibility of Evidence.*

Appellant in his brief lays small stress upon his exceptions to questions asked by the Court below, other than to venture the remark that witnesses were permitted to express opinions, to the prejudice of the defendant.

The opinion rule is based upon the principle that when all the facts for drawing an inference are before the jury, it is superfluous to add the opinion of the witness. But when the facts are not or cannot all be put before the jury, it is permissible for the witness to state his opinion, in order to put the jury completely in the witness's place.

A witness was asked by the Court what class of people was on a certain train, and the reply elicited was, colored people.

"Q. What class of colored people?

"A. A poor class of people, as they looked.

"Q. Can you draw any distinction in reference to appearance between this train and trains that ordinarily run on that line?

"A. I have been on those trains from Baltimore to Washington on several occasions and I never saw any crowds like this on those other trains."

When does matter of fact become matter of opinion? A difficult question, but we maintain that the answers elicited were in reality matters of *fact*, not opinion. But assuming for the time that this colloquy involved the expression of opinion, we submit it would have been permissible under a proper construction of the opinion rule, since the method pursued was the only way of putting the jury, or the judge in this case, in possession of all the facts and details observed by the witness.

The witness plainly did no more than this. There was evidently no prejudice, since the defendant himself testified

that the train in question was the sole one upon which persons carrying intoxicants were permitted to ride, and therefore not error.

Group III, Assignments 8, 9, 10, and 11.

Sufficiency of the Evidence.

Had the point made in the first assignment of error been well taken, the assignments in this group might have had some merit; but under our view of the law, they are not open to serious argument.

It is sufficient to prove the essential elements of the ~~de~~ offense. This was done, as shown by the record, and, having thus made a *prima facie* case, the Government was entitled to a verdict of guilty in the absence of any evidence by the defense.

It was not sought to prove that the liquor was brought into the District of Columbia unlawfully. Bringing or having it in the so-called five-mile zone constituted the offense. The reason for mentioning the District of Columbia is jurisdictional, since the law would have been violated by having the liquor within the zone at a point in Virginia or Maryland, in which case the prosecution would be in the proper Federal District of Virginia or Maryland. Therefore, in so far as the District of Columbia appears in the information where it is not requisite to show jurisdiction, it is mere surplusage, and as such may be rejected.

The defendant's evidence did not weigh strongly with the Court, which was perfectly justified in refusing to believe any or all the testimony adduced by the defendant. To hold that he should have been dismissed at the close of his testimony would be in effect a review of the finding on the facts, which this Court will not consider.

We know of no manner in which an act may be proved unlawful except by bringing it within the prohibition of the law. The evidence adduced by the Government sustained

every material part of the offense, and therefore as a matter of law the act complained of was unlawful.

Coffin vs. United States, 156 U. S., 432, while excellent law, is not deemed pertinent to this inquiry.

Kirby vs. United States, 174 U. S., 47, simply held that the record of conviction of larceny was not sufficient evidence in a trial for the receipt of the goods stolen, but that the defendant was entitled to be confronted with the witnesses against him.

Group IV, Assignment 12.

Motion in Arrest of Judgment.

The first five grounds stated in the motion in arrest of judgment, having been disposed of *ante*, will not be rediscussed.

Practically all the other points raised in the motion may be disposed of by answering these questions in the negative: (1) Was the act of Congress of May 18, 1917, unconstitutional for the reason that it delegated legislative powers to the President and Secretary of War? (2) Was the proclamation as published by the President void as being an assumption of power not delegated or intended by the act?

It has been held in this jurisdiction, as well as by a long line of cases in the Supreme Court of the United States, that while Congress cannot delegate to the courts, or to the Chief Executive, or to departmental heads, or to any other tribunals, powers strictly and exclusively legislative, still it may, after making a general legislative provision, delegate to others authority to fill in the details,—in other words, commit something to the discretion of other branches of the Government.

Attention is especially directed to *Prather vs. United States*, 9 App. D. C., 82, 88, in which the instant question was passed upon by this Court. The appellant was con-

victed in the Supreme Court of the District of Columbia, under a regulation of the Commissioner of Internal Revenue and the Secretary of the Treasury, made in pursuance of an act of Congress approved August 2, 1886 (24 Stat., 249), regulating the sale of oleomargarine. The constitutionality of the act is attacked on the ground that it leaves to the executive officers mentioned to determine by their regulation what shall constitute a criminal offense. This Court in upholding the act said:

“But we do not think that the criminal liability in the present instance is the creation or result of departmental or official regulation. It seems rather to fall into the category of offenses * * * in which Congress has fully declared the offense and departmental regulation has merely afforded the opportunity for its commission.”

In *Union Bridge Co. vs. United States*, 204 U. S., 364, 386, the appellant was charged under section 18 of the Rivers and Harbors Act of March 3, 1899 (30 Stat., 1121, 1153), which conferred upon the Secretary of War the duty of regulating bridges across navigable waterways of the United States. It was objected that the act delegated legislative powers and was unconstitutional.

The Court said:

“By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial

power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval the conclusion could not be avoided that executive officers, in all the Departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon Executive Departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be 'to stop the wheels of Government' and bring about confusion, if not paralysis, in the conduct of the public business."

In *Buttfield vs. Stranahan*, 192 U. S., 470, 496, Justice White said:

"We may say of the legislation in this case, as was said of the legislation considered in *Field vs. Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

In *Field vs. Clark*, 143 U. S., 649, 680, 683, 691, 692, 693, 694, Justice Harlan said:

"The true distinction, as Judge Ranney speaking for the Supreme Court of Ohio has well said, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

See also:

St. Louis, etc., Co. vs. Illinois, 185 U. S., 203.

In re Kollock, 165 U. S., 526.

Caha vs. United States, 152 U. S., 211.

Wayman vs. Southward, 10 Wheat., 1, 43, 45, 46.

The Brig Aurora, 7 Cranch, 382.

United States vs. Ford, 50 Fed., 467.

Cincinnati, etc., Railroad vs. Commissioners, 1 Ohio, 88.

Locke's Appeal, 72 Penn. St., 491, 498.

Moers vs. City of Reading, 21 Penn. St., 188, 202.

This act prescribes that alcoholic liquor shall not be brought in or near military camps; it declares that so having liquor shall be an offense, and provides the penalties.

It does not indicate how "near"; this is what it commits to the President. The matter of prescribing the extent of the zone is an executive duty that is properly remitted to the discretion of the Chief Executive.

We conclude, therefore, that question (1) must be answered in the negative and that the act is constitutional.

In answering question (2) it will clear the atmosphere to determine the legislative intent. The first resort, with a view to ascertaining the meaning of a statute, is the language used. If that is plain there is an end of construction and the statute is taken to mean what it says.

This act in unmistakable language prohibits anyone, soldier or civilian, to have alcoholic liquors *in* or *near* military camps. Having "in or near" necessarily imports transporting into or within the camps or the surrounding territory. Now, if due to the geographical location of a particular camp bringing "in or near" involved a journey from one State or Territory into another, it would be absurd to contend that Congress meant to exclude such a camp from the provisions of the act. The evident purpose was, as a military necessity, to do everything possible to promote the health and conserve the vitality of the men in the training camps, as well as to insure good order and discipline in the vicinity thereof.

The proclamation, we think, stopped short of the act; it assuredly went no further. By a comparison of the italicized portions of the act and the proclamation, *ante*, page 2, it will be seen that the one is practically a counterpart of the other.

Again, the answer must be negative and the conclusion reached that the proclamation was valid.

These two propositions being established, the questions asked in the appellant's brief, pages 15 and 18, require little discussion. To say the least, they become ill-expressed.

Whether or not the presidential proclamation was in contravention of the constitutional provision giving Congress

power to regulate interstate commerce, does not mean anything.

Congress created the offense; the proclamation merely created the opportunity for its commission, and set the date when it should be operative. The law violated, therefore, was an act of Congress, and if it did incidentally involve interstate commerce, it is no more than Congress had power to do, according to appellant's own argument.

Whether or not the proclamation superseded and repealed the act of Congress approved March 3, 1917 (39 Stat., 1123), becomes a mere academic question, since if it was superseded, the repeal was effected by an act of Congress, and we know of no law forbidding Congress, either by express words or intendment, from nullifying a former act.

We do not think the Shepherd law was repealed. In fact, it was the very existence of the Shepherd law which determined the extent of the zone. Had there been no law prohibiting the manufacture and sale of alcoholic liquors in the District of Columbia, the zone, instead of being five miles wide, would have been half a mile.

Repeals by implication are not favored in the law. It is only when two acts are in irreconcilable conflict that such a repeal occurs, and then only as to the portions which are thus repugnant, the later act in all cases prevailing.

Frost vs. Weenie, 157 U. S., 46.

Henderson's Tobacco, 11 Wall., 652.

Third Nat. Bank vs. Harrison, 8 Fed., 721.

Christie Street Com. Co. vs. U. S., 136 Fed., 326, 333.

Therefore, if by any possible construction the two acts could be considered in irreconcilable conflict on the question of "bringing in," so that they could not exist together, the zone law would survive at all events.

Appellant apparently does not rely upon grounds 8 and 9, in the motion in arrest (Rec., p. 22), and indeed it is evident that none of the inalienable rights preserved to cit-

izens by the fifth and fourteenth amendments to the Constitution were denied or infringed.

It appearing that no error was committed by the court below, it is respectfully submitted that its judgment should be affirmed.

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